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Part II

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Department of the Army, Corps of Engineers

Reissuance of Nationwide Permits; Notice

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

[ZRIN 0710–ZA02]

Reissuance of Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final notice.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is reissuing all existing nationwide permits (NWPs), general conditions, and definitions, with some modifications. The Corps is also issuing six new NWPs, two new general conditions, and 13 new definitions. The effective date for the new and reissued NWPs will be March 19, 2007. These NWPs will expire on March 18, 2012. The NWPs will protect the aquatic environment and the public interest while effectively authorizing activities that have minimal individual and cumulative adverse effects on the aquatic environment.

DATES: The NWPs and general conditions will become effective on March 19, 2007.

ADDRESSES: U.S. Army Corps of Engineers, Attn: CECW–CO, 441 G Street NW., Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202–761–4922 or by e-mail at *david.b.olson@usace.army.mil* or access the U.S. Army Corps of Engineers Regulatory Home Page at *http://www.usace.army.mil/inet/functions/cw/cecwo/reg/*.

SUPPLEMENTARY INFORMATION:

Background

In the September 26, 2006, issue of the **Federal Register** (71 FR 56258), the U.S. Army Corps of Engineers (Corps) published its proposal to reissue 43 existing nationwide permits (NWPs) and issue six new NWPs. The Corps also proposed to reissue its general conditions and add one new general condition.

The Corps proposal is intended to simplify the NWP program while continuing to provide environmental protection, by ensuring that the NWPs authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment and satisfy other public interest factors.

As a result of the comments received in response to the September 26, 2006, proposal, we have made a number of changes to the NWPs, general conditions, and definitions to further clarify the permits, facilitate their administration, and strengthen environmental protection. These changes are discussed in the preamble.

The Corps is reissuing the 43 existing NWPs, issuing six new NWPs, reissuing 26 existing general conditions, and issuing one new general condition. The Corps is also reissuing many of the NWP definitions, and providing 13 new definitions. The effective date for these NWPs, general conditions, and definitions is March 19, 2007. These NWPs, general conditions, and definitions expire on March 18, 2012.

While the Administrative Procedure Act requires a substantive rule to be published in the **Federal Register** at least 30 days before its effective date, exceptions to this requirement can be made for good cause (5 U.S.C. 553(d)(3)). We are utilizing this good cause exception to reduce hardships on the regulated public.

Grandfather Provision for Expiring NWPs

In accordance with 33 CFR 330.6(b), activities authorized by the current NWPs issued on January 15, 2002, that have commenced or are under contract to commence by March 18, 2007, will have until March 18, 2008, to complete the activity under the terms and conditions of the current NWPs.

Clean Water Act Section 401 Water Quality Certifications (WQC) and Coastal Zone Management Act (CZMA) Consistency Determinations

In the September 26, 2006, **Federal Register** notice and concurrent with letters from Corps Districts to the appropriate state agencies, the Corps requested initial 401 certifications and CZM consistency determinations. This began the Clean Water Act section 401 water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency determination processes.

Today's **Federal Register** notice begins the 60-day period for states, Indian Tribes, and EPA to complete their WQC process for the NWPs. This **Federal Register** notice also provides a 60-day period for coastal states to complete their CZMA consistency determination processes. This 60-day period will end on May 11, 2007.

While the states, Indian Tribes, and EPA complete their WQC processes and the states complete their CZMA consistency determination processes, the use of an NWP to authorize a discharge into waters of the United States is contingent upon obtaining individual water quality certification or a case-specific WQC waiver. Likewise, the use of an NWP to authorize an activity within, or outside, a state's coastal zone that will affect land or water uses or natural resources of that state's coastal zone, is contingent upon obtaining an individual CZMA consistency determination, or a case-specific presumption of CZMA concurrence. We are taking this approach to reduce the hardships on the regulated public that would be caused by a substantial gap in NWP coverage if we were to wait 60 days before these NWPs would become effective.

After the 60-day period, the latest version of any written position take by a state, Indian tribe, or EPA on its WQC for any of the NWPs will be accepted as the state's final position on those NWPs. If the state, Indian tribe, or EPA takes no action by May 11, 2007, WQC will be considered waived for those NWPs.

After the 60-day period, the latest version of any written position take by a state on its CZMA consistency determination for any of the NWPs will be accepted as the state's final position on those NWPs. If the state takes no action by May 11, 2007, CZMA concurrence will be presumed for those NWPs.

Discussion of Public Comments

I. Overview

In response to the September 26, 2006, **Federal Register** notice, we received more than 22,500 comments. We reviewed and fully considered all comments received in response to that notice.

General Comments

Many commenters provided general support for the proposal, and some of them stated that the changes are a step forward in improving consistency in the NWP program. Some commenters said that the proposed NWPs provide a balance between environmental protection and allowing development to occur. One commenter said that the NWP program provides sufficient environmental protection, through its general conditions and the ability for the district engineer to exercise discretionary authority to require individual permits. Several commenters stated that the proposed NWPs are simpler, clearer, and easier to understand. Three commenters said that further streamlining is necessary. One commenter recommended adopting a standard numbering system for paragraphs and subparagraphs within the NWP text. Three commenters said that the Corps should retain appropriate references to general conditions in the text of NWPs, for purpose of clarification.

To the extent that it is feasible, we have adopted a standard format for the

NWPs. Some NWPs require different formats, to make them easier to read and provide further clarification. For the most part, it is not necessary to retain references to general conditions in the text of the NWPs, except for general condition 27, Pre-Construction Notification, because most general conditions apply to all NWPs.

In contrast, a few commenters said that the proposed NWPs are not simpler and clearer. Three commenters declared that the proposed NWPs are more like individual permits than general permits. A number of commenters asserted that the proposed NWPs will significantly increase costs and delays for permit applicants. Four commenters said that the attempt at clarification and simplicity will reduce the flexibility of the NWP program.

The NWPs issued today are not similar to individual permits. The NWPs provide a streamlined form of Department of the Army authorization for those activities that result in minimal individual and cumulative adverse effects on the aquatic environment and satisfy other public interest review factors. In 2003, the average processing time for NWPs was 27 days and for individual permits it was 144 days. In response to comments received as a result of the September 26, 2006, **Federal Register** notice, we have modified some of the proposed NWPs to address provisions that could have unnecessary negative effects on regulatory efficiency and environmental protection.

Other commenters expressed general opposition to the proposal, and said that the proposal weakens protection for waters and should be withdrawn. Many of these commenters objected to the goals of ''streamlining'' or ''improving regulatory efficiency,'' stating that the focus of the NWPs should be on compliance with the Clean Water Act. Some commenters expressed opposition to the issuance of the NWPs, and said that activities proposed for NWP authorization should be individually subjected to a public notice and comment process. One commenter suggested that pre-construction notifications should be posted on district web sites for at least 30 days before an NWP verification is issued, to allow for public comment on those proposed activities.

The NWPs issued today comply with the requirements of the Clean Water Act. When the Clean Water Act was amended in 1977, Congress recognized the importance of general permits for the effective and efficient implementation of section 404. We do not agree that pre-construction notifications should be posted on the Internet for a public comment period. The review of pre-construction notifications by district engineers is sufficient for effective environmental protection. Some NWP activities require coordination with other Federal and/or State agencies, which provides a supplemental level of environmental protection. The activities authorized by NWPs have minimal adverse effects and are limited, within each permit, to narrowly defined categories of similar activities. Notice and opportunity for public comment on the authorization of these activities through NWPs is provided as part of the NWP promulgation process. The Corps believes this is the appropriate level of public notice and comment for these types of activities. Further, when reviewing pre-construction notifications, district engineers will exercise discretionary authority to require individual permits for those activities that they determine may result in more than minimal adverse effects on the aquatic environment or do not satisfy other public interest review factors, and thus warrant a more thorough individual review through a public notice and comment process.

Some commenters stated that the NWPs should require consideration of less damaging alternatives, and others said that the Corps did not provide sufficient scientific justification for proposed changes to the NWPs, or demonstrate that NWP activities result in minimal adverse environmental effects. One commenter said that there is not sufficient emphasis on avoidance of impacts to waters of the United States. Another commenter objected to using NWPs to expand existing projects, stating that it discourages avoidance and minimization.

The NWPs authorize only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment, and thus do not include a formal process for consideration of less damaging alternatives. General condition 20, Mitigation, requires permittees to avoid and minimize adverse effects to the maximum extent practicable on the project site. The Corps believes this ensures sufficient consideration of alternatives for the types of low-impact projects that are eligible for authorization through NWPs. The Corps notes that expansion of existing projects may support the goals of avoidance and minimization, in contrast to the alternative of developing new sites, which may involve more substantial adverse impacts. The 404(b)(1) Guidelines contain flexibility for those activities that result in minimal adverse effects on the aquatic environment. Compliance with the National Environmental Policy Act and the Section 404(b)(1) Guidelines is accomplished through decision documents prepared by the Corps. These decision documents contain findings that the NWPs result in minimal adverse effects, and are based on available data at the national scale. Division engineers issue supplemental decision documents for use of NWPs within Corps district boundaries.

Several commenters said that the NWPs do not protect small wetlands and waterbodies enough, and one commenter said that the proposed permits do not support the ''no overall net loss'' goal for wetlands. In contrast, one commenter stated that the proposal provides adequate protection to the environment and supports the ''no overall net loss'' of wetlands goal.

The NWPs protect all jurisdictional waters, including small wetlands and other waterbodies, through their terms and conditions, such as acreage limits and linear foot limits. The NWPs also support the ''no overall net loss goal'' through mitigation requirements, including aquatic resource restoration, establishment, enhancement, and preservation activities that may be required as compensatory mitigation. As noted above, general condition 20, Mitigation, also includes requirements for on-site avoidance and minimization.

Two commenters objected to allowing district engineers to issue waivers that allow permittees to exceed the limits of NWPs, stating that such waivers do not support the minimal adverse effects requirement. Two commenters said that the NWPs authorize unlimited impacts to waters of the United States. One commenter remarked that acreage limits should be consistent for all NWPs. One commenter stated that the acreage limits in the proposed NWPs are sufficient to ensure minimal adverse effects. Three commenters asserted that the acreage limits of the proposed NWPs are too low, and they reduce the effectiveness of the NWP program. One commenter said that the low acreage limits for the NWPs lessen incentives to reduce impacts to waters, since many projects that previously qualified for NWP authorization now require individual permits. Another commenter stated that the acreage limits for all NWPs should be based on appropriate scientific and environmental criteria.

Many of the NWPs have acreage limits, and most of those that do not are self-limiting due to the nature of the authorized activity (e.g., NWP 1 for aids to navigation or NWP 10 for mooring

buoys). Acreage limits in NWPs cannot be waived by the district engineer. Linear foot limits in some permits can be waived, but only for intermittent and ephemeral (not perennial) streams. Two NWPs (i.e., NWPs 13 and 36) have cubic yard limits that may be waived. Those NWPs that contain provisions allowing district engineers to waive linear foot or cubic yard limits require the district engineer to make a written determination of minimal adverse effects. In such cases, the permittee cannot assume that a waiver was granted if the district engineer does not affirm that waiver in writing (see general condition 27). The Corps believes these limited waiver provisions are appropriate because activities that exceed the limits may still have minimal adverse impacts and it may require a site-specific evaluation by the district engineer to decide if they do. Other NWPs that do not have limits typically provide environmental benefits, such as aquatic resource restoration activities authorized by NWP 27 or hazardous and toxic waste cleanup activities authorized by NWP 38.

NWPs 21, 49, and 50 are a special case, in that they authorize activities for which review of environmental impacts, including impacts to aquatic resources, is separately required under other Federal authorities (e.g., Surface Mining Control and Reclamation Act (SMCRA) permits for coal mining activities). The Corps believes it would be unnecessarily duplicative to separately require the same substantive analyses through an individual permit application as are already required under SMCRA. However, through the pre-construction notification review process, the district engineer will consider the analyses prepared for the SMCRA permit and exercise discretionary authority to require an individual permit in cases where the district engineer determines, after considering avoidance and reclamation activities undertaken pursuant to SMCRA, that the residual adverse effects are not minimal. The project sponsor is required to obtain written verification prior to commencing work.

The acreage limits for the NWPs are established so that they authorize most activities that result in minimal adverse effects on the aquatic environment. We acknowledge that there may be some activities that exceed the acreage limits and still have minimal impacts but the Clean Water Act requires us to ensure that all projects authorized by NWPs have minimal impacts, not that all minimal-impact projects can be authorized by NWPs. Activities that are not authorized through NWPs may be authorized through regional general permits or individual permits.

One commenter stressed that the NWPs must be reissued in time, so that there is no gap between the expiration date of the current NWPs and the effective date of the new NWPs. Two commenters recommended administratively extending the current NWPs until the effective date of the new NWPs, through 5 U.S.C. 558(c), which is used to administratively extend National Pollutant Discharge Elimination System (NDPES) permits issued under Section 402 of the Clean Water Act.

We cannot use 5 U.S.C. 558(c) to administratively extend the NWPs, since that provision of the Administrative Procedures Act applies only to activities of ''a continuing nature'' such as discharges of effluents authorized by National Pollutant Discharge Elimination System permits issued under Section 402 of the Clean Water Act. The vast majority of activities authorized by NWPs are construction activities, with specific start and end dates, either for the discharge of dredged or fill material into waters of the United States, or structures or work in navigable waters of the United States. In general, these NWP activities are not of a continuing nature, and do not meet the requirements of 5 U.S.C. 558(c). The grandfather provision at 33 CFR 330.6(b) can be used to continue the authorization for those NWP activities that are under construction, or under contract to begin construction, after the NWP expires. This provision of the NWP regulations allows the permittee up to one year to complete the authorized NWP activity. Today's reissued and new permits will become effective on March 19, 2007, the day after the existing permits expire. Thus there will be no gap in coverage. The Corps expects that some States may be able to make their final Section 401 water quality certifications for all or some permits by this date. In cases where the State has not completed a 401 water quality certification by this time, the Corps will issue provisional verifications and permittees will be required to obtain individual State certifications prior to commencing discharges into waters of the United States.

Compliance With Section 404(e) of the Clean Water Act and the 404(b)(1) Guidelines

Several commenters said that the proposed NWPs are contrary to the intent of section 404(e) to provide an expedited, streamlined permit program for activities that have minimal environmental impacts.

The NWPs continue to provide a streamlined authorization process for those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. Those activities that do not qualify for NWP authorization may be authorized by regional general permits or individual permits.

Many commenters asserted that the NWPs result in more than minimal adverse effects on the aquatic environment, individually and cumulatively. Several commenters said that the NWPs do not comply with the 404(b)(1) Guidelines. One commenter said that the Corps should provide quantitative statistics on actual impacts, to predict cumulative impacts resulting from the NWPs. Two commenters believe that the draft decision documents do not adequately demonstrate that NWPs will result in minimal individual and cumulative impacts to waters of the United States. They said that there is not sufficient documentation to support estimates of the number of times an NWP will be used, the acres impacted, and the acres mitigated. They also stated that there should be more specific evaluations of particular types of waters, as well as landscape considerations. Four commenters said that the Corps cannot rely on mitigation to ensure minimal adverse effects, stating that the evaluation of minimal adverse effects must be completed prior to issuing a general permit. Therefore, the Corps cannot rely on mitigation that will be offered by permittees when making its finding under the 404(b)(1) Guidelines.

When we issue the NWPs, we fully comply with the requirements of the 404(b)(1) Guidelines at 40 CFR 230.7, which govern the issuance of general permits under section 404. For the section 404 NWPs, each decision document contains a 404(b)(1) Guidelines analysis. Section 230.7(b) of the 404(b)(1) Guidelines requires only a ''written evaluation of the potential individual and cumulative impacts of the categories of activities to be regulated under the general permit.'' Since the required evaluation must be completed before the NWP is issued, the analysis is predictive in nature. The estimates of potential individual and cumulative impacts, as well as the projected compensatory mitigation that will be required, are based on the best available data from the Corps district offices, based on past use of NWPs. In our decision documents, we also used readily available national data on the status of wetlands and other aquatic

habitats in the United States, and the potential impacts of the NWPs on those waters.

The 404(b)(1) Guidelines at 40 CFR 230.7 do not prohibit the consideration of mitigation when making the predictive evaluation of potential individual and cumulative impacts that may be authorized by an NWP. The practice of using compensatory mitigation to ensure minimal adverse individual and cumulative adverse effects is an important component of the NWP program (see 33 CFR 330.1(e)(3)).

Two commenters said that the Corps cannot rely on regional conditioning and discretionary authority to ensure minimal adverse effects. One commenter objected to the ability of the district engineer to exercise discretionary authority to impose conditions on NWP activities. Another commenter stated that in order to ensure minimal adverse effects, pre-construction notification should be required for all NWPs. A number of commenters said that many of the NWPs do not authorize activities that are similar in nature. They said that the Corps is required to explain why activities authorized by an NWP are similar in nature to warrant authorization under a single NWP.

The pre-construction notification review process and discretionary authority are important tools to help ensure that the NWPs authorize only those activities with minimal individual and cumulative adverse effects. If the district engineer reviews a pre-construction notification and determines that the impacts are more than minimal, discretionary authority will be exercised and either the NWP will be conditioned to require mitigation or other actions to ensure minimal adverse effects or an individual permit will be required. The Corps disagrees that pre-construction notification is necessary for all NWP activities. However, the Corps has expanded the scope of activities requiring pre-construction notification. Specifically, all activities conducted under NWPs 7, 8, 17, 21, 29, 31, 33, 34, 37, 38, 39, 40, 42, 44, 45, 46, 49, and 50 now require pre-construction notification, regardless of acreage impacted. This will enable district engineers to better ensure that these permits authorize only activities with minimal impacts.

These NWPs satisfy the requirement under Section 404(e) of the Clean Water Act that the categories of authorized activities be similar in nature. The ''similar in nature'' provision does not require NWP activities to be identical to each other. We believe that the ''categories of activities that are similar in nature'' requirement of section 404(e) is to be interpreted broadly, for practical implementation of this general permit program. Nationwide permits, as well as other general permits, are intended to reduce administrative burdens on the Corps and the regulated public, by efficiently authorizing activities that have minimal adverse environmental effects. For each NWP that authorizes activities under Section 404 of the Clean Water Act, the 404(b)(1) Guidelines analysis provides a brief explanation as to why the activities authorized by that NWP are similar in nature.

One commenter said that consideration of impacts resulting from general permits should not be limited to the aquatic environment. This commenter said that Section 404(e) of the Clean Water Act requires permitted activities to have minimal impacts on the environment as a whole.

In addition to the requirement that there be no more than minimal adverse effects on the aquatic environment, activities authorized by NWPs must also result in minimal adverse effects with regards to the Corps public interest factors (see 33 CFR 330.1(d)), which include other components of the environment.

Compliance With the National Environmental Policy Act

Many commenters said that the Corps must complete an Environmental Impact Statement for the proposed NWPs. One commenter remarked that the EIS must consider the individual impacts of the NWPs, as well as their cumulative impacts. One comment asserted that mitigation cannot be used to justify using an environmental assessment for NEPA compliance, instead of an Environmental Impact Statement.

The NWPs authorize activities that have minimal individual and cumulative adverse effects on the aquatic environment and satisfy other public interest review factors. The NWPs do not reach the level of significance required for an EIS. The Corps complies with the requirements of the NEPA by preparing an environmental assessment for each NWP. When an NWP is issued, a Finding of No Significant Impact is also issued.

The use of mitigation to make a Finding of No Significant Impact is a standard practice for NEPA compliance. For the purposes of NEPA, mitigation includes avoiding impacts, minimizing impacts, rectifying impacts through repairing or restoring the affected environment, reducing or eliminating impacts over time through preservation and maintenance activities, and compensating for impacts by replacing or providing resources or environments (see 40 CFR 1508.20). Through the requirements of general condition 20, Mitigation, the review of pre-construction notifications by district engineers, and regional and special conditions imposed on the NWPs by division and district engineers, NWP activities use all these forms of mitigation so that the adverse effects of the NWPs do not reach the level of significance that requires an Environmental Impact Statement.

Several commenters stated that the draft decision documents do not satisfy the requirements of the National Environmental Policy Act (NEPA). Some commenters said that the analyses in the decision documents are not based on realistic data. One commenter noted that the average impact is often much less than the acreage limit for the NWP, and said that the mitigation ratios seem too high. One commenter said that the environmental assessments in draft decision documents must contain site-specific analyses. Two commenters asserted that the cumulative effects analyses in the decision documents are inadequate. One commenter said that the cumulative effects analysis should include information on the past use of NWPs, as well as information on other development activities expected to have impacts on protected resources.

We believe the data in the draft decision documents comply with the requirements of NEPA. The estimates of the projected use of the NWPs, the acres impacted, and the amount of compensatory mitigation are based on available data from Corps district offices, and other sources of data, such as surveys. Those data are based on pre-construction notifications and other requests for NWP verifications for activities that do not require pre-construction notification. For those NWP activities that do not require notification, it is necessary to derive estimates. For the decision documents, we must use predictive data, since the future use of an NWP is speculative. Likewise, we cannot provide site-specific information for these environmental assessments, because there are no specific sites or projects associated with the proposed issuance of an NWP. Authorized impacts are usually much less than the acreage limit for an NWP because of the avoidance and minimization required by the terms and conditions of the NWPs. The compensatory mitigation data provided in the decision documents include preservation.

On June 24, 2005, the Council on Environmental Quality issued guidance on the consideration of past actions for cumulative effects analyses. According to this guidance, the cumulative effects analysis needs to consider relevant past actions that can be used to analyze reasonably foreseeable effects that have ''a continuing, additive, and significant relationship to those effects.'' The guidance also recommends that agencies look at the present effects of past actions that are relevant because of significant cause-and-effect relationships with the effects for the proposed action and its alternatives. Except for a few activities, the NWPs do not authorize activities of a continuing nature. In general, they authorize construction activities with specific start and end dates. The NWPs can be issued for only a period of five years or less, and once an NWP expires, it cannot be used to authorize activities in waters of the United States. An activity must then be authorized by the reissued NWP, another NWP, a regional general permit, or an individual permit. The cumulative effects analysis is more properly focused on the permits that can be used to authorize regulated activities, not past permits that have expired. Therefore, the cumulative effects analysis for the NWP issuance needs to focus on the reasonably foreseeable cumulative effects that are expected to occur during the five year period the NWPs are valid. We use information on past use of the NWPs to estimate how often an NWP will be used during the period it will be valid, and to estimate the impacts and compensatory mitigation resulting from the use of that NWP.

One commenter requested clarification as to whether the draft decision documents included an environmental assessment, an EIS, or another type of NEPA document. Two commenters remarked that the Corps failed to solicit public comment on the environmental assessments for the proposed NWPs. Two commenters objected to the Finding of No Significant Impact (FONSI) in each draft decision document, stating that it is inappropriate to do a FONSI for a proposed action. Another commenter concurred with the FONSI found in each NWP decision document. One commenter said that the draft decision documents accurately analyzed anticipated environmental effects of the proposed NWPs.

A draft environmental assessment was prepared for each of the proposed NWPs. The draft environmental assessment was in the draft decision document, along with the draft statement of findings and, if the NWP authorized activities under Section 404 of the Clean Water Act, a draft Section 404(b)(1) Guidelines analysis. Those draft decision documents were available for public review and comment at the same time as the proposed NWPs, general conditions, and definitions. A number of commenters who commented on the proposed NWPs also commented on the draft decision documents. Commenters could also provide input on the draft FONSI in each decision document.

Compliance With the Endangered Species Act

In the September 26, 2006, **Federal Register** notice, we stated that we will conduct Endangered Species Act Section 7(a)(2) consultation for the NWPs. Since the issuance of the September 26, 2006, proposal, the Corps has been working with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) to develop an analysis plan to guide the formal programmatic Section 7 consultation for the NWPs. As soon as the analysis plan is completed, the Corps will request programmatic Endangered Species Act Section 7(a)(2) consultation with the USFWS and NMFS. Prior to the effective date of these NWPs, the Corps will issue a section 7(d) determination for the NWP Program.

Two commenters said the Corps must conduct Endangered Species Act consultation before the NWPs are issued. One of these commenters said that the Corps must conduct programmatic section 7 consultation for the NWP program, with mandatory district-by-district formal consultations. One commenter requested a timeline for the programmatic Section 7 consultation with the USFWS and NMFS. Another commenter asked for clarification whether Section 7 ESA consultation will be conducted for each NWP authorization or the NWP program as a whole. One commenter objected to the Corps conducting section 7 consultation for coal mining activities authorized by the Surface Mining Control and Reclamation Act.

The programmatic ESA consultation will be conducted for the NWP program as a whole, and will be concluded as expeditiously as possible. To address ESA compliance while programmatic consultation is being conducted, a revised Section 7(d) determination will be issued for the NWP program before the effective date of these NWPs. The Section 7(d) determination discusses how the issuance of these NWPs will not foreclose any options. The requirements of general condition 17 and 33 CFR 330.4(f) will ensure compliance with the ESA. We anticipate that the programmatic consultation will result in a biological opinion that provides tools that districts can use to better address potential impacts to the endangered and threatened species that occur in their areas of regulatory jurisdiction. Corps districts will conduct their own formal Section 7 consultations as necessary. The programmatic consultation will be conducted for the NWP program; its applicability to NWP 21 and other NWPs will be addressed as part of the programmatic consultation itself.

One commenter said that the Corps cannot rely on permit applicants to notify them in cases where ESA consultation is necessary. Two commenters said that the proposed changes to general condition 17, which requires district engineers to notify prospective permittees of their ''no effect'' or ''may affect'' determinations within 45 days of receipt of a complete pre-construction notification, violates the ESA since the Corps will be unable to make its decision based on the best available science. Two commenters said that the Corps must require pre-construction notifications for all NWP activities to help ensure compliance with the requirements of the ESA. Two other commenters stated that species-specific regional conditions must be imposed on the NWPs to protect endangered and threatened species.

Non-federal permittees shall notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and in such cases shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. This requirement applies even when a pre-construction notification would not otherwise be required. In such cases, this condition also prohibits the prospective permittee from conducting the NWP activity until the district engineer notifies him or her that the requirements of the ESA have been fulfilled and the activity is authorized by NWP. The ESA regulations at 50 CFR part 402 do not require ESA consultation for those activities that will not affect endangered or threatened species or destroy or modify designated critical habitat. In some districts, regional conditions will be imposed on the NWPs to protect listed species and critical habitat.

The notification requirement in general condition 17 does not violate the ESA. Forty-five days is generally

sufficient to screen proposed activities for potential effects to endangered and threatened species or designated critical habitat, and determine if section 7 consultation is necessary. The notification requirement will help improve ESA compliance by keeping the prospective permittee aware of the status of his or her pre-construction notification and preclude applicants from assuming that they can proceed after the 45 day pre-construction notification period has ended, if they have not heard back from the Corps that ESA requirements have been fulfilled and the activity is authorized. Districts will continue to develop regional conditions to further protect endangered and threatened species, as well as critical habitat.

Linear Foot Limits for Stream Bed Impacts

In the September 26, 2006, **Federal Register** notice, we proposed to modify several NWPs to include ephemeral streams in the 300 linear foot limits for losses of stream beds. We also proposed to allow district engineers to issue written waivers to the 300 linear foot limit for intermittent and ephemeral streams, upon making a determination that the adverse effects on the aquatic environment will be minimal. Many commenters objected to including ephemeral streams in the 300 linear foot limit for stream beds for NWPs 29, 39, 40, 42, and 43. Many other commenters supported the proposed change. A large number of commenters objected to allowing district engineers to waive the 300 linear foot limit, stating that miles of stream bed could be lost, resulting in more than minimal adverse environmental effects. A few commenters supported the proposed waiver. One commenter said that limits to filling or excavating ephemeral streams should be addressed through the regional conditioning process, instead of the national terms and conditions of the NWPs. Another commenter recommended imposing a higher linear foot limit for losses of ephemeral streams.

Ephemeral streams are important components of the stream network. Applying the 300 linear foot limit to ephemeral stream beds will help ensure that the applicable NWPs will authorize activities with minimal individual and cumulative adverse effects on the aquatic environment. The ability of district engineers to issue written waivers of the 300 linear foot limit for intermittent and ephemeral stream beds provides flexibility in the administration of the NWP program. In cases where the 300 linear foot limit is waived, the acreage limit of the NWP still applies. We believe it is more appropriate to limit losses of ephemeral stream beds through the national NWP terms and conditions, to provide consistent protection for those waters across the country. Regional differences in the values applied to ephemeral stream functions and services can be addressed through the waiver process. We believe the 300 linear foot limit, in conjunction with the waiver process, provides sufficient flexibility for the NWP program while ensuring minimal adverse effects.

Three commenters recommended that the Corps modify its definition of ''ephemeral stream'' to simplify the process of distinguishing between ephemeral and intermittent streams instead of applying the 300 linear foot limit to ephemeral streams. Another commenter indicated that the difficulty of distinguishing between ephemeral and intermittent streams is sufficient justification for including ephemeral streams in the 300 linear foot limit. In contrast, several commenters stated that including ephemeral streams in the 300 linear foot limit would not simplify the administration of the NWP program, because it would result in a large number of individual permits, as well as substantial increases in the Corps workload. Two commenters asked the Corps to establish criteria for determining when a waiver of the 300 linear foot limit can be issued. One commenter stated that the 300 linear foot limit should not apply to filling or excavating drainage ditches. One of these commenters said that an acreage limit should be applied to streams, instead of a linear foot limit.

Modifying the definition of ''ephemeral stream'' is not an appropriate alternative to modifying the 300 linear foot limit. The definitions of ''ephemeral stream'' and ''intermittent stream'' that were first promulgated for the NWPs in 2000 are based on the hydrologic differences between those stream types, especially the differences in how the stream bed interacts with the water table. We do not agree that the changes to the 300 linear foot limit will result in a large increase in the number of individual permits processed per year. Under the current NWPs, district engineers could exercise discretionary authority and require individual permits if proposed impacts to ephemeral streams would be more than minimal. We do not believe it would be appropriate to establish national criteria for determining when a waiver of the 300 linear foot limit would be applied. These determinations should be made on a case-by-case basis by district engineers, depending upon assessments of site-specific conditions. Even though the acreage limits of NWPs 29, 39, 40, 42, and 43 also apply to losses of stream bed, the linear foot limit is a useful tool for ensuring minimal adverse effects to these linear aquatic ecosystems. The 300 linear foot limit for filling and excavating stream beds does not apply to ditches constructed in wetlands, or to ditches constructed in uplands that are determined to be waters of the United States. However, the 300 linear foot limit does apply to ditches that are constructed by modifying streams through channelization or other activities.

Pre-Construction Notification

Many commenters objected to the proposal to add or expand pre-construction notification requirements for several NWPs, and a few of these commenters said that lowering the pre-construction notification threshold will substantially increase the Corps workload. Several commenters stated that increasing the number of activities that require pre-construction notification will result in additional delays and costs for permit applicants. In contrast, a number of commenters said that pre-construction notification should be required for all NWP activities, so that site-specific concerns can be more effectively addressed. One commenter asserted that the use of the pre-construction notification process and the use of discretionary authority should be limited, to provide more certainty to the NWP authorization process. Another commenter said that the decision to lower pre-construction notification thresholds should be left to division engineers and the regional conditioning process, to provide more flexibility for the NWP program.

Modifying NWPs 39, 40, 42, and 43 to require pre-construction notification for all activities will help ensure that these NWPs authorize only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors, such as flood hazards and floodplain values. Corps districts have already been receiving large numbers of verification requests for NWP 39, 40, 42, and 43 activities that do not require pre-construction notification, so we believe that this change will not result in a substantial increase in our workload. In addition, the modified pre-construction notification threshold will facilitate compliance with the Endangered Species Act and Section 106 of the National Historic Preservation Act, by better ensuring notice of activities that

may have a higher likelihood of affecting endangered or threatened species, designated critical habitat, or historic properties. We do not agree that it is necessary to require pre-construction notifications for all NWP activities, because many NWP activities have negligible effects on the aquatic environment and the public interest review factors. We have focused the pre-construction notification requirements on those activities that have the potential for adverse effects that may require additional scrutiny by district engineers, including ESA and/or NHPA consultation.

The pre-construction notification and discretionary authority processes provide flexibility to the Corps regulatory program, by allowing the Corps to focus its limited resources on activities that have the potential to have more than minimal adverse effects on the aquatic environment. We believe that the proposed changes to the pre-construction notification thresholds are necessary for effective implementation of the NWP program, and to address issues of concern at the national level.

One commenter objected to the increased use of the pre-construction notification process and the waivers of limits, such as the 300 linear foot limit for the loss of intermittent and ephemeral stream beds for certain NWPs, to authorize activities by NWP. Another commenter said that it is an administrative burden to require the use of NWP 33 with other NWPs when in-stream construction activities need to occur in dry conditions. This commenter said that NWP 33 should only be used when temporary work is done in waters of the United States, and no other NWP is needed to authorize permanent structures or fills for the activity. One commenter recommended requiring pre-construction notifications for filling waters of the United States that are five or more feet deep, because of the effects on the hydrologic balance of a region.

The ability to waive limits after the review of a pre-construction notification and a written determination that the adverse effects of a particular NWP activity will be minimal provides flexibility to the NWP program, and allows the Corps to focus more of its resources on those activities that require individual permits and may have substantial adverse effects on the aquatic environment and the public interest. In the final NWPs, we have addressed the concern regarding the requirement to use NWP 33 for all temporary construction, access, and dewatering activities. Those changes are discussed in further detail for each applicable NWP. Many NWP activities that result in a discharge of dredged or fill material into waters of the United States, regardless of water depth, require pre-construction notification, which will allow district engineers to review those activities on a case-by-case basis and assess potential effects on the hydrologic balance of the area in the vicinity of the proposed work.

One commenter said that the pre-construction notification process should be modified to require notification of Indian Tribes, to provide them with the opportunity to comment on proposed activities that may result in the violation of Indian rights. This commenter also said that if the Indian Tribe identifies a potential conflict with Federally-protected Indian rights, the use of the NWPs should not be allowed.

The regional conditioning process, as well as government-to-government consultation between Tribes and the Corps districts where Tribal lands are located, are more appropriate mechanisms to address this commenter's concerns, since there are over 580 Federally-recognized tribes, and each Tribe is likely to have different concerns regarding the implementation of the NWP program. General condition 16 states that no NWP activity may impair reserved Tribal rights. Activities that do impair reserved Tribal rights are not authorized by NWPs. Regional conditions are an effective mechanism for addressing the concerns of a specific Indian Tribe, and can be used to facilitate working relationships between the Corps and the Tribe to help the Corps fulfill its trust responsibilities.

Clean Water Act Jurisdiction

On June 19, 2006, the Supreme Court issued its decision in the case of *Rapanos et ux, et al,* v. *United States.* Many commenters cited this decision, as well as other court decisions, and said that the proposed NWPs exceed the Corps jurisdictional authority under Section 404 of the Clean Water Act. Several commenters said that ephemeral streams are not subject to Clean Water Act jurisdiction and should not be covered in the NWPs. Another commenter asserted that intermittent streams are not waters of the United States.

The Rapanos decision, as well as other court decisions made in the past several years, raises questions about the jurisdiction of the Clean Water Act, including Section 404, over some intermittent and ephemeral streams and their adjacent wetlands. The Corps will assess jurisdiction regarding such waters on a case-by-case basis in accordance with evolving case law and any future guidance that may be issued by appropriate Executive Branch agencies (e.g., the Corps, U.S. Environmental Protection Agency). Under the current regulations and guidance, intermittent and ephemeral streams may meet the regulatory definition of ''waters of the United States'' and be subject to Clean Water Act jurisdiction. Regulatory jurisdiction over these waterbodies will be determined on a case-by-case basis by district engineers, in accordance with current and future regulations and guidance.

One commenter said that when applying the NWP acreage limits to wetlands, the Corps should not include all wetlands, just those subject to Clean Water Act jurisdiction. One commenter stated that a clearer definition of ''navigable waters'' is needed. Another commenter said that ditches are not waters of the United States, and impacts to ditches should instead be addressed through state programs. A commenter stated that the Corps must promulgate regulations to define ''waters of the United States'' for the purposes of implementing the NWP program.

The acreage limits of the NWPs apply only to losses of waters of the United States, including jurisdictional wetlands (see the definition of the term ''loss of waters of the United States'' in the ''Definitions'' section of the NWPs). Similarly, linear foot limits apply only to jurisdictional streams. Ditches may also be subject to jurisdiction under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, if they meet the regulatory definitions of ''waters of the United States'' and/or ''navigable waters of the United States.'' Waters of the United States are defined at 33 CFR part 328 and navigable waters of the United States are defined at 33 CFR part 329.

Regional Conditioning of Nationwide Permits

One commenter stated that regional conditions are unnecessary, and result in too much restriction of the NWPs. A commenter remarked that placing too many regional conditions on the NWPs is contrary to E.O. 13274, Environmental Stewardship and Transportation Infrastructure Project Reviews. One commenter said that regional conditions should not be redundant with the requirements of other agencies, and the streamlining objective of the NWPs should be maintained.

Regional conditions are necessary to account for regional differences in aquatic resource functions, services, and values and to ensure that the NWPs

authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors. Regional conditions are important tools for protecting endangered and threatened species, designated critical habitat for those species, essential fish habitat, historic properties, and other important resources. As a general matter, we agree that regional conditions should not duplicate the requirements of other agencies, but the Corps often has the responsibility to comply with other statutes and regulations administered by other agencies.

Two commenters said that there needs to be clearer rules for the adoption of regional conditions for the NWPs. A couple of commenters indicated that districts need to provide justifications for proposed regional condition, and make that information available to the public. Three commenters said that regional conditions should not be limited to further restricting the use of the NWPs. One commenter said that regional conditions should not be based on district boundaries. Instead, they should be based on ecoregions or other ecologically-delineated areas. Another commenter recommended that the Corps work with other agencies to develop a list of high value wetlands in which NWPs cannot be used.

Regional conditions may only further condition or restrict the applicability of an NWP (see 33 CFR 330.1(d)). In areas where environmental conditions and other circumstances warrant less restrictive general permit conditions, district engineers may issue regional general permits to authorize similar activities, as long as those general permits meet applicable requirements. The regulations governing the adoption of regional conditions are provided at 33 CFR 330.5(c). We believe it is necessary to provide flexibility to division engineers to determine the necessity and appropriateness of regional conditions to address concerns regarding the use of NWPs in a particular area. The notices issued by Corps districts soliciting public comment on proposed regional conditions are required to include statements concerning the environmental factors or other public interest factors resulting in the need for regional conditions (see 33 CFR 330.5(c)(1)). Regional conditions may be based on geographic areas other than district boundaries. Regional conditions may be imposed on the use of NWPs in watersheds, counties, states, ecoregions, or other types of areas. General condition 19, designated critical resource waters, provides a national list of high value waters. Districts can coordinate with other agencies to develop lists of high value wetlands within their district boundaries.

Data Collection

One commenter said that the supporting data used by the Corps falls short of the standards required by the Data Quality Act of 2001, and the Office of Management and Budget's ''Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies.'' This commenter stated that the Corps should provide data on aquatic resource functions to support its minimal impact determinations.

The data used for the NWP decision documents are the best available data at a national scale. The estimated impacts and mitigation provided in the decision documents were developed by reviewing and analyzing permit data from our district offices, as well as through consideration of how proposed changes to the NWPs would affect the amounts of authorized impacts and mitigation. Data on aquatic resource functions is generally not available. The National Wetland Inventory examines wetland status and trends for the conterminous United States, but information on wetland quality and function is not available.

Three commenters expressed concern about tracking permanent and temporary impacts to waters of the United States and recommended that the Corps implement a national tracking and monitoring system. This system would also facilitate the sharing of information with cooperating resource agencies and help improve decision making.

We are in the process of transitioning to a new automated information system (AIS) for the Corps regulatory program. The new AIS is version 2.0 of the ''OMBIL Regulatory Module'' (ORM 2.0). This national tracking and monitoring system will improve and standardize data collection for the Corps regulatory program, and will assist in decision-making for permit actions and other types of regulatory activities, such as jurisdictional determinations. ORM 2.0 will be spatially enabled, using geographic information systems and other analytical tools that will provide more efficient and effective processing of permit applications, jurisdictional determinations, and other tasks. Cumulative impact analysis will also be supported by ORM 2.0. The structure of ORM 2.0 will also be standard among Corps districts, providing for more consistent information collection and storage, and will be readily available for analysis and reporting. The standard structure of ORM will also promote consistency in Regulatory Program implementation.

ORM 2.0 will help improve data collection for the NWP program, as well as other types of permits issued by the Corps. Data collection will be more standard among permit types, especially for impact and mitigation data. We will continue to collect data on authorized losses of waters of the United States, including resource type, acreage, and impact type. ORM 2.0 incorporates several additional AIS resources to assist in the tracking of all required compensatory mitigation, including the amount, type (e.g., reestablishment), and source (i.e., permittee-responsible mitigation, mitigation bank, or in-lieu fee).

ORM 2.0 will also facilitate compliance with the Endangered Species Act, the National Historic Preservation Act, and the essential fish habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act. Screening tools based on available data for those resources will help Corps personnel identify activities that may affect those resources and require further consultation. The available resource data will be provided by other agencies, through data sharing agreements. Available data sets from the national, state, and local levels can be utilized by ORM 2.0.

ORM 2.0 is capable of supporting electronic interagency coordination. For activities that typically require interagency coordination and consultation, agencies will have the option of receiving electronic coordination notices and consultation requests and of responding to the Corps via a link to ORM 2.0. Agencies will be required to enter into a Memorandum of Agreement supporting the use of electronic communications for permit activities.

ORM 2.0 will also include time tracking features to help remind Corps project managers when the end of the 45-day pre-construction notification review will occur. Monitoring and enforcement activities will also be supported by ORM 2.0, including the tracking of when monitoring reports for compensatory mitigation projects are due.

ORM 2.0 will also support an electronic permit application, thereby allowing prospective permittees to submit their pre-construction notifications electronically to the appropriate Corps district. Permit

applicants will be able to check the status of their permit applications through the electronic permit Web site.

Other Issues

One commenter said that the Corps should stop issuing NWPs until effective compensatory mitigation is provided for those permits. Several commenters stated that the Corps places too much reliance on compensatory mitigation, citing recent studies that concluded that compensatory mitigation projects often fail to achieve their objectives. A couple of commenters asserted that the Corps should not rely on compensatory mitigation to ensure minimal individual and cumulative adverse effects. Another commenter objected to the more stringent requirements for compensatory mitigation for NWP activities, stating that compensatory mitigation for small impacts tends to be more expensive than the costs to plan and construct the proposed activity requiring NWP authorization.

Compensatory mitigation is an important mechanism to help ensure that the NWPs authorize activities that result in minimal individual and cumulative adverse effects on the aquatic environmental. We acknowledge that the ecological success of compensatory mitigation projects varies widely. Some compensatory mitigation projects fail to meet their objectives, while others do result in successful replacement of aquatic resource functions that are lost as a result of activities authorized by NWPs. We are committed to improving compliance for compensatory mitigation required for Department of the Army permits, including NWPs. District engineers have the flexibility to determine when compensatory mitigation should be required for activities authorized by NWPs. If it is not appropriate or practicable to require compensatory mitigation for a particular activity, and that activity will result in minimal adverse effects on the aquatic environment, then the district engineer may determine that compensatory mitigation is not necessary. Otherwise, if the proposed activity will result in more than minimal adverse effects on the aquatic environment after determining that compensatory mitigation is not appropriate or practicable, then an individual permit would be required.

One commenter said that the NWPs do not distinguish between different types of waters, but combine waters when applying the acreage limit for the NWP. This commenter stated that the Corps needs to recognize that different types of waters often have different functions.

The NWPs do recognize different types of waters. The terms and conditions of NWPs are often based on the characteristics of different types of waters. For example, NWP 39 does not authorize discharges of dredged or fill into non-tidal wetlands adjacent to tidal waters.

One commenter said that the requirement for NWP activities to be single and complete projects should not be removed, citing the proposed changes to NWPs 13, 15, 18, and 19. This commenter stated that the requirement for single and complete projects does not appear outside of the Corps definition at 33 CFR 330.2(i). One commenter objected to the removal of the requirement in several NWPs to submit an avoidance/minimization statement with the pre-construction notification.

The requirement that NWPs authorize single and complete projects applies to all NWPs. Limiting the NWPs to authorize only single and complete projects is a long-standing practice, and we are adding a new general condition (GC 28) to clarify that the NWPs only authorize single and complete projects.

The requirement for an avoidance/minimization statement that was in NWPs 39, 43, and 44 is not necessary, because we have modified NWP 39 to require pre-construction notification for all activities, and we are requiring pre-construction notification for all construction and expansion of storm water management facilities under NWP 43. In addition, general condition 20 requires permittees to avoid and minimize adverse effects to waters of the United State to the maximum extent practicable on the project site. When reviewing a pre-construction notification, the district engineer will determine whether sufficient avoidance and minimization of impacts to waters of the United States has occurred, and whether the activity complies with general condition 20. It is the responsibility of the district engineer to make this determination, and we do not believe it is appropriate to place that burden on the prospective permittee by requiring the submittal of a statement with the pre-construction notification.

One commenter recommended that the Corps adopt an administrative appeal process for activities authorized by NWPs, which would provide for third party appeals. Another commenter said that compliance inspections should be conducted for a certain number of NWP activities per year. One commenter said that the Corps needs to do more enforcement and monitoring of activities authorized by NWPs.

We do not believe it would be appropriate or necessary to establish an administrative appeal process for the NWP program, since the NWPs authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. The administrative appeal process at 33 CFR part 331 applies only to individual permits and jurisdictional determinations, and does not provide for third party administrative appeals.

Performance measures established for the Regulatory Program require our district offices to conduct compliance inspections for a proportion of general permit activities occurring in a given year.

One commenter said that the Corps should retain a separate NWP for aggregate mining activities (the current NWP 44), and provide greater acreage limits, since the proposed modification of NWP 44 will have little utility for the aggregate mining industry.

We do not believe it would be appropriate to issue another NWP for aggregate mining activities, with greater acreage limit. The acreage limit for NWP 44 is intended to ensure that this NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. This NWP authorizes aggregate mining activities.

Two commenters said that all references to excavation in the NWPs should cite 33 CFR 323.3(d) to clarify that not all excavation activities require section 404 permits. One commenter suggested adding a new general condition which would require submittal of a delineation of non-jurisdictional wetlands with the pre-construction notification for those NWPs authorizing development activities, so that states could be notified of these activities. One commenter said that NWPs should not authorize activities in springs, seeps, headwater streams, and fens.

Many excavation activities result in discharges of dredged material that require section 404 permits. When reviewing pre-construction notifications, district engineers will determine whether an excavation activity results in a discharge of dredged material and requires a section 404 permit, or whether a permit is not needed. It is not appropriate for the Corps to require prospective permittees to submit delineations of areas that are not waters of the United States with their pre-construction notifications. States that regulate these non-jurisdictional aquatic habitats should

address those concerns through their permit processes. The NWPs can be regionally conditioned to restrict or prohibit NWP activities in springs, seeps, headwater streams, and fens.

One commenter requested that the Corps reissue NWP 26, which authorized discharges into headwaters and isolated waters, in accordance with the limits described in the December 13, 1996 **Federal Register** notice.

There are no plans to reissue NWP 26. This NWP expired on June 7, 2000. We have issued NWPs that have replaced NWP 26.

Water Quality Certification/Coastal Zone Management Act Consistency Determination Issues

One commenter said that the Corps should provide an opportunity for state and Tribal water quality certification agencies to participate early in the NWP reissuance process, to reduce potential conflicts during the water quality certification process. Another commenter requested clarification regarding enforcement of the NWPs, in cases where a provisional NWP verification is issued, but the permittee proceeds with work without receiving the individual water quality certification. This commenter asked whether the Corps or the state would initiate an enforcement action. One commenter objected to use of provisional NWP verifications in cases where water quality certification has not yet been issued for a particular NWP activity.

We cannot begin coordination for water quality certification at an earlier time in the NWP reissuance process. States and Tribes need to see the proposed permit and general condition language, which is not available until the publication of the proposal in the **Federal Register**, in order to proceed with the certification process. We believe there is generally adequate time to complete the water quality certification process, however, where there is not, the Corps will issue only provisional verifications until the State or Tribe has completed its certification process; in this case, permittees are required to obtain individual certification directly from the State or Tribe before commencing work.

If a provisional NWP verification is issued, the activity is not authorized by NWP until the required water quality certification is obtained or waived. If the project proponent begins the work before water quality certification is obtained or waived, the district engineer has full authority to initiate an enforcement action for the discharge of dredged or fill material into waters of the United States without a valid permit, in violation of the Clean Water Act. The district engineer will use his or her discretion, when determining whether to pursue an enforcement action. The use of provisional NWP verifications is necessary to provide timely responses to prospective permittees in cases where the State or Tribe has not yet completed its certification process. In addition, some States prefer not to issue general certifications for some or all NWPs. These States require a review of individual PCNs before issuing water quality certification for a particular activity.

Discussion of Comments and Final Permit Decisions

Nationwide Permits

NWP 1. *Aids to Navigation.* There were no changes proposed for this NWP, and no comments were received. This NWP is reissued without change.

NWP 2. *Structures in Artificial Canals.* There were no changes proposed for this NWP, and no comments were received. This NWP is reissued without change.

NWP 3. *Maintenance.* We proposed to modify this NWP by removing the provisions for the restoration of uplands damaged by discrete events. We also proposed to add maintenance dredging or excavation of intakes, outfalls, and canals, which was authorized by NWP 7.

Several commenters expressed support for the proposed changes to this NWP. One commenter objected to the removal of the explicit references to the ''water quality'' and ''management of water flows'' general conditions, stating that the removal of those references would change the intent of the NWP. One commenter recommended removing the language regarding the disposal of excavated material in upland areas, since it implies that excavation activities are regulated by the Corps under Section 404 of the Clean Water Act. Several commenters recommended adding language to clarify that excavation activities, or incidental fallback, do not require a section 404 permit. One commenter said that the definition of ''currently serviceable'' should remain in the text of this NWP, instead of moving it to the ''Definitions'' section.

Even though explicit references to general conditions were removed from its text, all general conditions, including those general conditions cited above, are still applicable to this NWP. The terms of this NWP require permittees to deposit and retain dredged or excavated materials in an upland area, unless the district engineer authorizes the use of another area. This term does not suggest that excavation activities not involving discharges of fill or dredge material into Section 404 waters are regulated by the Corps. Instead, it specifies the type of site that may receive dredged or excavated material under this NWP for activities that do require Section 404 authorization. Excavation activities in waters of the United States require section 404 permits if they result in a discharge of dredged or fill material into those waters (see 33 CFR 323.2(d)). Activities that result in only incidental fallback do not require permits. Since the definition of ''currently serviceable'' is used in NWPs 41 and 47, it is more appropriate to have the definition in the ''Definitions'' section, for easier reference.

A couple of commenters objected to moving the provision authorizing the repair, rehabilitation, or replacement of structures or fills destroyed or damaged by discrete events to proposed NWP A, which requires pre-construction notification for all activities. These commenters said that the proposed change would hinder the ability of utility companies and transportation departments to quickly repair utility lines, roads, and other important infrastructure damaged or destroyed by severe storms. One commenter suggested adding another note to this NWP, to refer potential applicants to NWP 45 in cases where structures that have been made non-functional by some discrete event may qualify for repair, rehabilitation, or replacement.

We have restored the language authorizing the repair, rehabilitation, or replacement of structures or fills destroyed or damaged by storms or other discrete events in paragraph (a) of NWP 3, and removed it from proposed NWP A (now designated as NWP 45). Because of this change, it is no longer appropriate to add a note to this NWP to refer to NWP 45.

One commenter suggested that this NWP should not be used to authorize additional or new work, fill, riprap or structures that was not part of the original authorization. One commenter stated that the continued maintenance, repair, restoration, and replacement of a structure may represent ongoing impacts that are more than minimal, and may preclude restoration of environmental features at the project site. This commenter said that those types of activities should require on-going mitigation. Another commenter said that this NWP should not be reissued, since its use results in more than minimal adverse impacts to the

aquatic environment. Another commenter suggested that this NWP should not authorize replacement of structures and fill, and that it should be restricted to repair or rehabilitation activities involving 50 percent or less of a structure. One commenter said that this NWP should authorize modifications to older structures that would help improve the aquatic environment. This commenter also recommended replacing the use of riprap with less environmentally damaging alternatives, such as bioengineered structures.

This NWP does not authorize any significant increase in the original structure or fill. Only minor deviations necessary to conduct repairs and maintenance, or the placement of the minimum necessary riprap to protect the structure, are eligible for authorization under this NWP. Because of the nature of activities authorized by this NWP, as a general rule compensatory mitigation should not be required for these maintenance activities. If a Department of the Army permit was required to construct the original structure or fill, appropriate compensatory mitigation would have been required by the district engineer when the permit was issued, to offset the loss of aquatic resource functions and services resulting from the authorized work. Additional compensatory mitigation is usually unnecessary to maintain those structures or fills. The terms and conditions for NWP 3, plus any regional conditions imposed by division engineers, will ensure that this NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. We believe that this NWP should continue to authorize the replacement of structures or fills, or rehabilitation activities, since those activities usually result in minimal adverse effects on the aquatic environment. As for modifying this NWP to authorize changes to structures that would improve the aquatic environment, we believe it would be more appropriate for district engineers to authorize such changes through other permits. Changes to structures would require more thorough evaluation to ensure that net improvements to the aquatic environment will occur. The use of bioengineering methods to protect existing structures may not be very effective, because of the environmental conditions, such as water flows, near these structures. Riprap is usually the most effective means of protecting these structures, and the terms of this NWP require minimization of the footprint of the riprap. District engineers can consider bioengineering on a case-by-case basis, and authorize such activities as appropriate.

One commenter said that this NWP should not authorize the maintenance of bank stabilization structures that are more than 300 feet long. One commenter suggested dividing paragraph (b) into two subparagraphs. One subparagraph would authorize debris and sediment removal and the other subparagraph would authorize riprap. This commenter also indicated that this NWP should be modified to limit the removal of sediment to the minimum necessary to ''restore the bed of the waterway to its natural grade.''

This NWP authorizes only activities that repair or return an activity to previously existing conditions. We do not believe it is necessary to further restrict this NWP to limit maintenance of bank stabilization structures. Dividing paragraph (b) into two subparagraphs is not needed, since the riprap is typically used to protect the structure once the accumulated sediment has been removed. The purpose of this NWP is to authorize restoring structures or fills to their original condition. It may not be possible to determine the ''natural grade'' of the waterway, and this may not have been the condition at the time the structure or fill was originally authorized. Therefore, we believe the current language is more appropriate.

Several commenters recommended modifying this NWP to authorize both permanent and temporary impacts of maintenance activities, since the requirement to submit a pre-construction notification for temporary impacts would significantly increase regulatory and administrative burdens on the applicants and the Corps, without any environmental benefits or added value to the process.

We agree, and have added a new paragraph (c) to this NWP to address temporary structures, fills, and work necessary to conduct the maintenance activities authorized by this NWP.

Several commenters objected to the requirement to provide information about original design capacities and configurations of the structures and canals as part of the pre-construction notification for the proposed activity. These commenters stated that this information may not exist or be readily available, particularly for old facilities and structures. These commenters recommended that the information be required only where it is reasonably available. Alternatively, the commenters proposed retaining the language regarding the project not causing more than minimal changes to the flow characteristics of the stream, or increased flooding, instead of specifically requiring original design information.

The provision to require information regarding the original design capacities and configurations of structures and other features is only applicable when maintenance dredging is proposed. We believe that this information can be developed fairly easily, since the capacities and configurations of the outfalls, intakes, impoundments, and canals can be developed or inferred by examining the existing facilities, in cases where historical documentation is not available.

Several commenters expressed opposition to the terms of the NWP that limit the removal of sediment to the minimum necessary to restore the waterway to the approximate dimensions that existed when the structure was built. Another commenter recommended changing the language to require restoration of the project to its original design conveyance capacity.

The current language is adequate to ensure that this NWP authorizes necessary sediment removal activities that result in minimal adverse effects on the aquatic environment. We believe that the limits for the removal of sediments should be established with regard to the conditions of the waterway itself at the time of project construction rather than to the specifications of the structures.

One commenter requested clarification as to whether the 200 foot limit on the removal of accumulated sediment is subject to the ½ acre limit found in other NWPs.

This NWP does not have a ½ acre limit. If this NWP is used with another NWP to authorize a single and complete activity, then the activity is subject to the requirements of general condition 24, Use of Multiple Nationwide Permits. If this NWP is used with an NWP with a ½ acre limit, such as NWP 39, then the ½ acre limit would apply to the single and complete project.

One commenter requested the addition of ''flood conveyance channels'' to paragraph (b) of this NWP, instead of requiring the use of NWP 31. Another commenter stated that additional routine maintenance activities, which are authorized by NWPs 31 and 43, should be consolidated under NWP 3. One commenter suggested adding language to clarify that this NWP authorizes emergency repairs of submarine fiber optic cables.

NWP 31 is being reissued to authorize maintenance activities for existing flood control facilities, including flood conveyance channels. Therefore, we do not believe it is necessary to modify NWP 3 to authorize those activities. We are also reissuing NWP 43 to authorize maintenance activities for storm water management facilities. Emergency repairs of submarine fiber optic cables may be authorized by this NWP, provided the activity meets its terms and conditions.

One commenter indicated that small sediment removal projects should not require pre-construction notification. Another commenter stated that pre-construction notification should not be required for the placement of riprap to protect structures. A few other commenters said that pre-construction notification should not be required for activities authorized by paragraph (b) of this NWP. In contrast, one commenter suggested that pre construction notification should be required for all activities covered under NWP 3.

We believe that the pre-construction notification requirements for this NWP are appropriate. Pre-construction notification is required for those activities that may have the potential to cause more than minimal adverse effects on the aquatic environment.

One commenter recommended that sediments should be sampled to project depth prior to dredging, and that sandy sediment suitable for nearshore disposal should be returned to the littoral system down drift of the project site.

Regulatory Guidance Letter 06–02 establishes that testing of dredge material is not required when there is reason to believe that no contaminants are present in the material. Therefore, a standard requirement to sample and test sediments to be dredged under NWP 3 would not be appropriate. The nearshore disposal of sandy sediments should be addressed through separate authorizations, such as individual permits, since those activities may have more than minimal adverse environmental effects.

One commenter indicated that significant wetland habitat development has been observed on sediments left in place for many years within canals associated with outfall and intake structures. That commenter stated that exempting maintenance activities in such canals from the 200 linear foot restriction may have a significant impact on the wetland habitats in these channels. Another commenter suggested that the placement of riprap or any other bank stabilization material in, or the removal of accumulated sediment from, any special aquatic site should be prohibited.

Since this NWP only authorizes activities that restore an area to its previous condition, we do not believe it is appropriate to prohibit the maintenance of structures or fills simply because a special aquatic site may have formed in these areas. District engineers will review pre-construction notifications to determine if the placement of riprap or the removal of accumulated sediments in special aquatic sites would cause more than minimal impact, and use discretionary authority to address situations where they would.

One commenter stated that affected tribes should be informed of all pre-construction notifications for this NWP that involve in-water work and be provided 30 days to provide comments. This commenter also suggested that while bioengineered projects are less environmentally damaging than riprap and offer benefits to salmon, the presence of wood in some bank protection structures has the potential to interfere with treaty fishing access by preventing the use of nets.

Coordination of proposed NWP 3 activities with Indian tribes is more appropriately addressed through government-to-government consultations with Corps districts. General condition 16, Tribal Rights, does not allow an activity or its operation to impair reserved tribal rights, including but not limited to, reserved water rights and treaty fishing and hunting rights. Compliance with this general condition, along with coordination with interested Indian Tribes, will help protect tribal rights.

One commenter suggested that the placement of riprap should be the minimum necessary to protect the structure, in order to reduce adverse effects to habitat-forming processes within waterbodies, such as salmon habitat. Another commenter said that this NWP should not authorize maintenance work on culverts that fail to meet appropriate standards for the upstream and downstream passage of fish, or culverts that do not allow for the downstream passage of substrate and wood.

The terms and conditions of this NWP limit the placement of riprap to the minimum necessary to provide adequate erosion protection. Other NWP general conditions, such as general condition 17 for endangered species, may provide additional protection for species of concern, as well as their habitat. General condition 2 prohibits activities which could disrupt the necessary life cycle movements of aquatic species.

One commenter stated that pre-construction notifications should be required for all NWP 3 activities to ensure compliance with its terms and conditions. Another commenter stated that the Corps should carefully review all maintenance applications to ensure that the area impacted is not larger than needed to complete the maintenance activities, and that no additional impacts are authorized or conducted.

We do not agree that pre-construction notification should be required for all activities. The terms and conditions of this NWP are adequate to ensure that it authorizes only those activities with minimal adverse effects on the aquatic environment. Where there are concerns for the aquatic environment, division engineers can regionally condition this NWP to require pre-construction notification or other measures.

One commenter said that streams near roads may migrate from their original location and compromise the road. This commenter said that for those situations, this NWP should authorize relocation of the stream back to its original location. The commenter also indicated that small channel realignments should be authorized to properly convey the water into culverts.

This NWP does not authorize new stream channelization or stream relocation projects. Those activities may be authorized by other Department of the Army permits.

This NWP is reissued with the modifications discussed above.

NWP 4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* We proposed to remove the provision for shellfish seeding, since we proposed to modify NWP 27 to authorize this activity. No comments were received. This NWP is reissued as proposed.

NWP 5. *Scientific Measurement Devices.* We proposed to remove the pre-construction notification requirement for discharges of 10 to 25 cubic yards for the construction of small weirs and flumes, but retain the 25 cubic yard limit for such construction.

Several commenters supported this NWP and the proposed removal of the pre-construction notification requirement on the basis that activities authorized under this NWP result in minimal impacts. Another commenter agreed with the removal of the pre-construction notification requirement for discharges of 10 to 25 cubic yards for construction of weirs and flumes because it will facilitate the implementation of water quality improvement projects sponsored by Federal, State, and local agencies, as well as the scientific community. Two

commenters objected to the removal of the pre-construction notification threshold. One commenter recommended conditioning this NWP to ensure that authorized activities do not interfere with the movements of organisms within watercourses or prevent ingress or egress of aquatic organisms.

Based on our past experience with this NWP, we believe the removal of the pre-construction notification requirement for discharges of 10 to 25 cubic yards for the construction of small weirs and flumes is appropriate. Project proponents are required to comply with all applicable general conditions, including general condition 2, Aquatic Life Movements, which prohibits activities from substantially disrupting life cycle movements of aquatic organisms. Further, we believe the district engineer's authority to issue case-specific special conditions and to impose regional conditions to require pre-construction notifications for certain activities, such as activities involving specified quantities of fills for the construction of small weirs and flumes, is adequate to address local concerns regarding potential adverse effects to the movement of aquatic organisms.

One commenter said that the NWP should have a condition requiring all temporary devices to be removed when the devices will no longer be used. This commenter also asked whether this NWP authorizes the installation of single measurement devices or multiple measurement devices.

The removal of temporary fills is required by general condition 13. The NWP authorizes single and complete scientific measurement device projects. Scientific measurement devices with independent utility can be authorized by separate NWP authorizations.

This NWP is reissued as proposed.

NWP 6. *Survey Activities.* We proposed to modify this NWP to add exploratory trenching to the list of authorized activities and to authorize the construction of temporary pads used for survey activities, provided the discharge does not exceed 25 cubic yards.

Two commenters supported the proposed modifications and one commenter said that the NWP would result in more than minimal impacts to the aquatic environment. One commenter stated that there should be a ¼ acre limit for exploratory trenching. This commenter also suggested imposing a 25 cubic yard limit on all activities authorized by this NWP.

It has been our experience that exploratory trenching results in minimal adverse effects on the aquatic environment, and this NWP has been conditioned to require restoration of the trenched area upon completion of work. Since most impacts associated with exploratory trenches are temporary, an acreage limit is not necessary. Division engineers may impose regional conditions to require pre-construction notifications or specific limits for certain activities. District engineers may also exercise discretionary authority and require an individual permit if a proposed activity would result in more than minimal adverse effects on the aquatic environment. It is unnecessary to impose a 25 cubic yard limit on all discharges authorized by this NWP, since most of these discharges are temporary. Temporary fills must be removed upon completion of the work, in accordance with the requirements of general condition 13. Any permanent fills are likely to be small in size, because of the types of activities authorized by this NWP.

One commenter suggested adding language regarding the backfilling of the exploratory trench. Some commenters stated that the definition of ''exploratory trenching'' should include more prescriptive details such as benchmarks, width, and depth.

We are conditioning this NWP to require permittees to backfill the top 6 to 12 inches of exploratory trenches constructed in wetlands with topsoil from the trench. This change will bring consistency with the terms of other NWPs that authorize trenching activities. We do not believe that it is necessary to include prescriptive limits on the trench dimensions. However, division engineers may choose to establish such limits through regional conditions.

One commenter suggested that the 25 cubic yard limit for discharges associated with temporary pads should be removed. Another said that the 25 cubic yard limit should apply to the cumulative amount of material for multiple drill sites. Two commenters said that limits should be placed on the amount of such discharges because a state may not issue water quality certification for this NWP.

The 25 cubic yard limit is necessary to help ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. It also provides a suitable limit on the quantity of discharge necessary for construction of these temporary pads. The cubic yard limit for temporary pads applies to a single and complete project, as defined at 33 CFR 330.2(i). If a state does not issue water quality certification for this NWP, an individual water quality certification must be obtained or waived for each activity before it is authorized in that state.

One commenter stated the NWP should also authorize temporary access roads. Such work may qualify for the 404(f) exemption for temporary mining roads or could be authorized by NWP 33.

The NWP is reissued with the modification discussed above.

NWP 7. *Outfall Structures and Associated Intake Structures.* We proposed to move maintenance dredging and excavation activities to NWP 3. We also proposed to change the title of this NWP to more clearly describe what it authorizes.

Several commenters supported moving maintenance dredging and excavation activities to NWP 3, while one commenter objected to the proposed change. One commenter said this NWP should require pre-construction notification only for section 10 activities, since Clean Water Act authorization for these structures is already provided through the permit process under Section 402 of the Clean Water Act. One commenter stated that construction and maintenance of outfall structures should not include bank stabilization structures.

Outfall structures and associated intake structures require section 404 authorization if they involve discharges of dredged or fill material into waters of the United States. Sections 404 and 402 of the Clean Water Act address different types of discharges. In addition, the permitting criteria under section 404 differ from those of section 402. In addition, some activities authorized by this NWP may be exempt from section 402 permit requirements. The pre-construction notification requirement is necessary to ensure that activities authorized by this NWP will have no more than minimal adverse impacts to the aquatic environment. Bank stabilization activities are not authorized by this NWP but may be authorized by NWP 13 or other types of permits.

One commenter suggested adding a provision to require intake structures constructed for withdrawing cooling water to adhere to requirements contained in Section 316(b) of the Clean Water Act. Another commenter suggested that this NWP should include a reference to the U.S. Environmental Protection Agency's section 316(b) implementation initiative and require incorporation of Best Technology Available methods developed from this initiative. This commenter also said that intake structures should utilize passive screens with openings not to exceed one centimeter (or one millimeter in waters

having anadromous fish), with a maximum intake velocity of 0.5 feet per second.

Section 316(b) of the Clean Water Act is implemented through (and only applies to) permits issued pursuant to Section 402. Thus, any structure that is in compliance with regulations issued under the NPDES program (Section 402) must also be in compliance with regulations issued under Section 316(b). Specific suggestions regarding technology choices for intake structures are more appropriately addressed through other permit authorities, such as the 402 program. Activities authorized by this NWP may require other Federal, State, or local permits or licenses.

One commenter suggested adding modifications of existing intakes as an authorized activity, for cases where intake structure modifications are required by rules recently promulgated under Section 316(b) of the Clean Water Act. Another commenter recommended adding a note to refer applicants to NWP 3 for future maintenance activities.

In the first sentence of this NWP, we have added the phrase ''or modification'' after the word ''construction. It is important to note that this NWP only authorizes the construction or modification of intake structures that are associated with outfall structures. This would include cooling water intake structures where the heated cooling water is subsequently discharged back into the waterbody from which is was withdrawn. Adding a note referencing NWP 3 for future maintenance activities is inappropriate, since there may be outfall structure maintenance activities that do not qualify for NWP 3 authorization.

One commenter requested clarification that this NWP authorizes only those activities that require permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. This commenter said that the current text of this NWP indicates that all outfall and associated intake structures that require section 402 permits would also require an NWP authorization.

This NWP authorizes outfall structures and associated intake structures that require authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. If the construction or modification of an outfall structure or associated intake structure that requires a section 402 permit does not involve discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States, then a Corps permit is not required.

One commenter recommended conditioning this NWP to require intake structures to be marked in a manner that will reduce hazards to navigation during and after construction. Another commenter said that this NWP should not authorize dredging operations during fish spawning seasons. One commenter said that this NWP should prohibit the stockpiling of excavated materials where sediment may erode to surface waters. A commenter asserted this NWP should be conditioned to prohibit exposure of surface waters to wet concrete, which may be toxic to aquatic organisms.

General condition 1 states that any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained. This condition adequately addresses potential hazards to navigation. Maintenance dredging associated with outfall structures and their intake structures may be authorized by NWP 3 or another type of permit. General condition 3 states that activities in spawning areas that occur during the spawning seasons must be avoided to the maximum extent practicable. General condition 12 addresses requirements for soil erosion and sediment controls. Although concrete may be toxic under certain circumstances, it is generally not considered to have toxic pollutants present in toxic amounts. Therefore, its use is not generally prohibited by general condition 6, Suitable Materials.

One commenter said that agency coordination should be required for the construction of intake structures, because those structures may impinge and entrain larval fish.

We do not believe it is necessary to require agency coordination for the construction of intake structures. For cooling water intake structures, this issue is already addressed by the Section 402 program. For other types of intakes, it would be more appropriate to address concerns regarding the impingement and entrainment of larval fish through regional conditions or special conditions. Division and district engineers, in consultation with resource agencies, can develop species-specific regional or special conditions to protect larval fish.

This NWP is reissued with the modification discussed above.

NWP 8. *Oil and Gas Structures on the Outer Continental Shelf.* We proposed to clarify that pre-construction notification is required for all activities authorized by this NWP. No comments were received. This NWP is reissued as proposed.

NWP 9. *Structures in Fleeting and Anchorage Areas.* There were no changes proposed for this NWP. One commenter said that moorage structures may preclude the continued exercise of Tribal fishing rights. This commenter also asked that the Corps consult with Indian Tribes that utilize these areas for fishing, and requested that pre-construction notification be required for all activities authorized by this NWP.

General condition 16 states that NWP activities cannot impair reserved tribal rights. Division and district engineers can consult with Tribes to develop regional conditions that will further ensure that tribal rights are not impaired by this NWP. Division engineers can regionally condition this NWP to require coordination with Tribes when proposed activities may affect Tribal lands or trust resources.

The NWP is reissued without change.

NWP 10. *Mooring Buoys.* There were no changes proposed for this NWP. One commenter stated that individual mooring buoys can interfere with the exercise of Tribal fishing rights and should not be authorized by NWP. This commenter also said that pre-construction notification should be required for all activities authorized by this NWP, and the Corps should consult with Indian Tribes with usual and accustomed fishing grounds. Another commenter suggested limiting mooring buoys to areas outside of Federal navigation channel or dredged material placement areas.

General condition 16 states that NWP activities cannot impair reserved tribal rights. Division and district engineers can consult with Tribes to develop regional conditions that will ensure that tribal fishing rights are not impaired by activities authorized by this NWP. District and division engineers will consider the need to add regional conditions or case-specific conditions where necessary to protect tribal rights. Prohibiting the placement of mooring buoys in Federal navigation channels or dredged material placement areas is not desirable. There are occasions where it may be appropriate to place mooring buoys in these areas on a permanent or temporary basis, where the adverse effects on navigation and other public interest review factors are minimal. Mooring buoys authorized by this NWP must comply with general condition 1, Navigation. Division engineers may also add regional conditions to this NWP to prohibit the placement of mooring buoys in certain Federal navigation channels or other areas of concern.

The NWP is reissued without change.

NWP 11. *Temporary Recreational Structures.* There were no changes proposed for this NWP. One commenter suggested that temporary buoys, markers, small floating docks, and similar structures can interfere with the exercise of treaty fishing access and, therefore, in an area subject to treaty fishing, notification to affected tribes is required. The commenter further stated that regional conditions should be added to require that such structures shall be removed from salmon spawning areas prior to commencement of the spawning season. Another commenter suggested that temporary recreation structures may come into conflict with Tribal fisheries and that pre-construction notification should be required. In addition, consultation with Indian Tribes with usual and accustomed fishing grounds in the area should also be conducted.

This NWP cannot authorize any activity that may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights (see general condition 16). District and division engineers will consider the need to add regional conditions or case-specific conditions where necessary to protect such tribal rights.

One commenter recommended conditioning the NWP to require temporary recreation structures to be removed within seven days after the use has been discontinued, instead of the 30 days specified in the NWP. One commenter asserted that the required approval from the reservoir manager should be in writing.

Shorter time periods for removal can be imposed through regional conditioning, or through special conditions provided in NWP verifications. The process for approving buoys or markers at Corps of Engineers reservoirs is at the discretion of the reservoir manager.

The NWP is reissued without change.

NWP 12. *Utility Line Activities.* We proposed to modify this NWP by removing the provisions authorizing the construction of permanent and temporary access roads and simplifying the pre-construction notification thresholds. Several commenters supported all proposed changes to this NWP.

One commenter recommended modifying this NWP to explicitly include utility line relocation, in addition to utility line construction, maintenance, and repair. Two commenters suggested reducing the authorized duration of temporary sidecasting. One of these commenters said that four weeks is sufficient time for temporary sidecasting, and the other commenter recommended a time limit of 30 days. One commenter said that this NWP should require all trenched material to be returned to the trench as backfill, not just the upper 6 to 12 inches, to sustain groundwater hydrology and prevent drainage of wetlands and other waters of the United States. One commenter requested that total impacts at the site be limited to 3/10 acre.

This NWP authorizes the relocation of utility lines, which is covered by the construction, maintenance, and repair activities authorized by this NWP. We believe that three months is an appropriate time frame for temporary sidecasting of excavated material into waters of the United States. Division engineers can regionally condition this NWP to reduce the authorized period of temporary sidecasting, to further ensure minimal adverse effects. In response to a pre-construction notification, district engineers can add special conditions to the NWP authorization to reduce the length of time temporary sidecasting is authorized. We do not agree that it is necessary to require that all trenched material be returned to the trench to maintain pre-construction hydrology. The NWP explicitly prohibits backfilling the trench in a manner that would result in a french drain effect, and drain nearby waters. We believe the 1/2 acre limit for this NWP is sufficient to ensure that it authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. This limit applies to the total discharges associated with the single and complete project.

Several commenters supported the proposed pre-construction notification thresholds for this NWP, stating that they are simpler than the current thresholds and would capture many of those utility line activities that required pre-construction notification under the 2002 NWP. A couple of commenters recommended retaining the pre-construction notification thresholds of the NWP 12 issued in 2002. A number of commenters said that the pre-construction notification for temporary losses of greater than 1/10 acre of water of the United States should be eliminated. Some of these commenters stated that this pre-construction notification threshold is confusing, because it is not consistent with the definition of ''loss of waters of the United States.'' Other commenters recommended changing the phrasing of this pre-construction notification threshold from ''temporary loss'' to ''temporary impact'' to provide consistent terminology for the NWPs. Several commenters said that the 1/10 acre pre-construction notification threshold for temporary losses should be eliminated, because it is not necessary to ensure minimal adverse effects and it is not consistent with the pre-construction notification thresholds of other NWPs. One commenter indicated that the pre-construction notification threshold for temporary losses would result in a dramatic increase in the numbers of pre-construction notifications submitted to the Corps. Another commenter stated that this pre-construction notification threshold would remove incentives for project proponents to minimize temporary impacts. Several commenters said that requiring pre-construction notifications for temporary losses greater than 1/10 acre would increase the number of wetland delineations required to be submitted with those notifications.

One commenter asked if an activity resulting in impacts of 1/10 acre or less to special aquatic sites, including wetlands, would require pre-construction notification. Another commenter said that there may be utility line activities resulting in the loss of less than 1/10 acre that may result in more than minimal adverse effects on the aquatic environment. One commenter objected to the removal of the pre-construction notification requirement for activities that include mechanized landclearing of forested wetlands, stating that this may result in significant habitat loss of forested wetlands and a significant permanent loss of forested wetland functions. One commenter recommended requiring pre-construction notifications for activities that may impact fish passage.

We are restoring the pre-construction notification thresholds that were in the NWP 12 issued in 2002, so that district engineers will be able to conduct case-by-case review for certain utility line activities that have the potential to result in more than minimal adverse effects on the aquatic environment. Pre-construction notification will be required if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6)

permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. Discharges resulting in temporary losses of waters only will no longer trigger a pre-construction notification requirement, unless they trigger one of the criteria above.

Division engineers can regionally condition this NWP to require pre-construction notification for other utility line activities, if there are concerns for the aquatic environment or public interest that warrant lower pre-construction notification thresholds, such as endangered or threatened species, or impacts to forested wetlands. General condition 2, Aquatic Life Movements, requires permittees to not disrupt necessary life cycle movements of aquatic organisms, such as fish.

Several commenters requested that the definition of single and complete project, as applied to utility line projects, be modified to state that the 1/10 acre pre-construction notification threshold applies to the entire utility line and not to each separate water or wetland crossing.

The requirement to submit a pre-construction notification for those utility line activities listed in the ''Notification'' paragraph of this NWP applies to a single and complete project, as defined at 33 CFR 330.2(i). In the case of a utility line, a single and complete project consists of a single crossing of a water of the United States, or more than one crossing at the same location (see the definition of ''single and complete project'').

Several commenters expressed opposition to the proposed removal of access roads from this NWP, especially the construction of temporary access roads, which would require authorization under NWP 33 and require pre-construction notification for all activities. One commenter supported the use of NWPs 14 and 33 for utility line access roads, because it would provide greater flexibility in the locations where these roads could be built. Most of these commenters expressed concern that requiring pre-construction notification for all temporary access road construction activities will significantly increase the regulatory burdens on permittees and most likely cause substantial delays in utility line projects. One commenter said that access roads should be retained in this NWP, with a ½ acre limit for the utility lines and a ½ acre limit for the access road. Several commenters stated that requiring authorization of permanent access roads through NWP 14 could result in impacts greater than ½ acre at the site of a single and complete project. One commenter said that utility line substations should be authorized by another NWP, because these facilities can be constructed at a more distant location from the utility line.

After considering these comments, as well as the probable negative effects that this proposed change would have on essential services such as the distribution of energy to the public, we have decided to retain authorization of permanent and temporary access roads in NWP 12. We have added a paragraph to authorize access roads, using language from the NWP 12 issued in 2002. We are also putting Note 2 back into this NWP. This note states that access roads used for both construction and maintenance are authorized by this NWP. This note has been adapted from the NWP 12 issued in 2002, but revised to clarify that temporary access roads may be authorized by NWP 12, provided the area is restored to pre-construction elevations and revegetated as appropriate. To address concerns about temporary impacts to waters of the United States associated with utility line activities, we are adding explicit requirements to remove all temporary fills in their entirety, return affected areas to pre-construction elevations, and revegetate affected areas as appropriate.

The ½ acre limit for this NWP applies to each single and complete utility line activity. There are not separate acreage limits for utility lines and access roads. Retaining authorization of access roads in this NWP, as well as authorization for utility line substations, will help provide effective authorization for utility line activities.

One commenter recommended reformatting this NWP to be consistent with other NWPs. Another commenter suggested that the phrase ''provided the activity does not result in the loss of greater than ½ acre of those waters'' be deleted, since the ½ acre limit is indicated in the first paragraph of this NWP. One commenter said that mitigation should be required for all NWP activities. Another commenter stated that the NWP should clarify that mitigation banks may be used to provide compensatory mitigation for permanent adverse effects authorized by this NWP.

The format of this NWP need not be consistent with the other NWPs, because of the authorized activities. We are retaining the reference to the ½ acre limit in the paragraph that authorizes utility line substations, to make it clear that any losses associated with this activity are included in the ½ acre limit. A similar reference to the ½ acre limit is also provided in the paragraph authorizing access roads. Mitigation requirements for this NWP will be established in accordance with general condition 20, Mitigation. This general condition states that mitigation banks may be used to provide compensatory mitigation for activities authorized by NWPs.

One commenter suggested adding language to this NWP that would require sand and gravel excavated from a lake bed during trench excavation to be temporarily sidecast in a manner such that it would not be buried by material with finer grain sizes. Another commenter stated that this NWP should not be used to authorize utility line activities in streams that support salmon.

Concerns for potential impacts to lake substrate are more appropriately addressed through either the special conditions added to an NWP authorization by the district engineer, or by regional conditioning of the NWP by division engineers. Potential impacts to salmon are also more appropriately addressed through regional conditions or the review of pre-construction notifications, including the district engineer's use of discretionary authority and the addition of special conditions to the NWP authorization.

One commenter said that this NWP should be conditioned to require placement of the utility line in the right-of-way of existing or proposed roads or at the narrowest section of wetlands or streams. This commenter also stated that the number of stream crossings should be limited to the minimum necessary.

These concerns are addressed by general condition 20, Mitigation, which requires avoidance and minimization on the project site to the maximum extent practicable. It is not appropriate to condition this NWP to require utility lines to be placed in existing rights-of-way or at the narrowest sections of waters of the United States. Often it is not feasible to limit utility lines to these areas, and practicable alternatives are usually rather limited. Many utility lines need to be installed in areas without roads.

One commenter said that this NWP should require communication or power poles to be upgraded to current standards to avoid detrimental impacts to migratory birds. This commenter also stated that this NWP should not authorize wind generating turbines.

Design requirements for communication or power poles relative to migratory birds are more appropriately addressed through other

regulatory programs. Wind generating turbines are not considered to be utility lines. To the extent that the construction of wind generating turbines requires Department of the Army authorization, those activities may be authorized by individual permits, regional general permits, or other NWPs (e.g., NWP 25).

NWP 12 is reissued with the modifications discussed above.

NWP 13. *Bank Stabilization.* We proposed to modify this NWP to authorize bank stabilization activities in special aquatic sites, provided the prospective permittee submits a pre-construction notification.

Several commenters expressed support for the proposed changes to this NWP. Several commenters stated that this NWP will result in more than minimal adverse effects to the aquatic environment, particularly for headwater streams, and that individual permits should be required for these activities. Other commenters stated that the linear limits of this NWP should be reduced and that the waivers to the linear foot and cubic yard limits should be removed to ensure that the NWP authorizes only those activities with minimal adverse effects on the aquatic environment. Several commenters stated that bank stabilization projects in excess of 500 feet or involving more than one cubic yard per running foot should be evaluated as individual permits, with opportunity for public review.

The terms and conditions of this NWP, especially the pre-construction notification requirements, will help ensure that this NWP authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. The 500 linear foot and the one cubic yard limits must be waived in writing by the district engineer, or the NWP cannot be used to authorize activities that exceed these limits. Bank stabilization activities are often necessary to help protect property, as well as water quality. In response to a pre-construction notification the district engineer can add special conditions to the NWP authorization to ensure minimal adverse effects, or exercise discretionary authority and require another type of permit, such as an individual permit, for the activity. Division engineers can regionally condition this NWP to protect high value waters and other important resources.

One commenter recommended modifying the text of this NWP to clarify that authorized activities are not limited to rivers and streams, but that this NWP can also be used in coastal areas. Several commenters stated that this NWP should not authorize impacts to special aquatic sites. One commenter recommended requiring a written waiver from the district engineer to authorize discharges of dredged or fill material into special aquatic sites. A few commenters said that mitigation should always be required for activities authorized by this NWP.

This NWP can be used to authorize bank stabilization activities in all waters of the United States, including rivers, streams, and coastal areas. We do not believe it is necessary to modify the text of this NWP to list the types of waterbodies in which it can be used. Because many streams include or are bordered by special aquatic sites, precluding use of this permit in these areas significantly limits its usefulness. It may be beneficial to watersheds to stabilize eroding banks, even though small amounts of fringe wetlands or mudflats may be impacted by a bank stabilization activity. Therefore, bank stabilization activities involving discharges of dredged or fill material into special aquatic sites may be authorized by this NWP but pre-construction notification is required for all such activities, which will provide an opportunity for the district engineer to review those activities to ensure that any adverse effects on the aquatic environment are minimal. For additional assurance, we have added a new paragraph (d) to require a written waiver from the district engineer if the activity involves discharges of dredged or fill material into special aquatic sites. If a written waiver is not issued by the district engineer, then this NWP does not authorize such discharges. In response to a pre-construction notification, the district engineer will exercise discretionary authority if the proposed bank stabilization activity is in a special aquatic site and will result in more than minimal adverse effects on the aquatic environment. Division engineers may also regionally condition this NWP to prohibit discharges of dredged or fill material into special aquatic sites, where there are concerns for the aquatic environment or other public interest review factors.

We do not believe compensatory mitigation should be required for all bank stabilization activities. In cases where the bank stabilization activity affects a special aquatic site, it may be appropriate for the district engineer to require compensatory mitigation. For bank stabilization activities in other waters of the United States, the district engineer may determine that it is not necessary to require compensatory mitigation.

Several commenters stated that pre-construction notification should be required for all activities authorized by this NWP. One commenter suggested adding language to clarify that any requests for waivers of limits for this NWP would be approved or denied during the 45-day pre-construction notification review period. Another commenter requested that additional language be added to the text of the NWP to clarify that bank stabilization activities are authorized unless prohibited by the district engineer following review of the pre-construction notification.

We do not agree that it is necessary to require pre-construction notification for all activities authorized by this NWP. Many small bank stabilization activities are conducted each year that result in minimal adverse effects on the aquatic environment. We have modified paragraph (a)(2) of general condition 27 to clarify that NWP activities that require written waivers of limits are not authorized unless the district engineer issues the written waiver. In other words, a default NWP authorization does not occur after 45 days if the proposed activity requires a written waiver. The modification to general condition 27 is sufficient to address this concern, and it is not necessary to modify the text of this NWP. In the case of this NWP, all activities that require a pre-construction notification also require a written waiver. The Corps will do its best to process requests for such waivers within 45 days.

One commenter stated that this NWP should not be used to authorize bank stabilization activities in waters of the United States inhabited by anadromous fish. One commenter stated that use of wood in bank stabilization projects may interfere with tribal rights, such as treaty fishing access, and therefore affected tribes should be notified of requests to use this NWP. Several commenters said interagency coordination should be conducted on all NWP 13 pre-construction notifications.

Division engineers can regionally condition this NWP to restrict or prohibit its use in waters inhabited by anadromous fish. General condition 16, Tribal Rights, states that activities authorized by NWP cannot impair reserved treaty rights. Division and district engineers should consult with Tribes to develop regional conditions where necessary to ensure that tribal rights are adequately protected by this NWP. Division engineers can regionally condition this NWP to require coordination with Tribes when proposed NWP activities may affect Tribal lands or trust resources. General

condition 27, Pre-Construction Notification, sets out the requirements and procedures for interagency coordination for all NWPs; we do not believe additional requirements are necessary for this permit.

A number of commenters requested clarification as to whether the linear and running foot limits in this NWP are applicable to the length of the bank or the length of the stream channel. Several commenters stated that the prohibition against stream channelization should be retained, while others recommended that it be removed because many bank stabilization activities could be considered stream channelization projects. One commenter stated that this NWP should not be used to authorize hardening of bank surfaces. A number of commenters also stated NWP 13 should only authorize vegetative or bioengineered stabilization methods and not bank hardening methods. One commenter recommended modifying this NWP to encourage bioengineered methods, or placement of riprap above the ordinary high water mark or high tide line, by not requiring pre-construction notification for such activities. Two commenters said that this NWP should be limited to bioengineering, living shoreline, or vegetative bank stabilization techniques, and that individual permits should be required for bank stabilization activities involving the placement of rip-rap and other hard armoring techniques.

The linear foot and cubic yard limits apply to the length of the bank. We have modified paragraph (b) of this NWP to clarify that the 500 linear foot limit applies to the length of the bank stabilization activity, not the length of the stream segment. We are retaining paragraph (g), since stream channelization activities may result in more than minimal adverse effects on the aquatic environment. Bank stabilization activities differ from stream channelization activities in several ways. Bank stabilization reduces or eliminates erosion to prevent the loss of structures or adjacent property, and typically only one side of a stream is stabilized. The location and cross-section shape of the waterway is generally unaffected except for material placed along the stabilized bank. Stream channelization alters the length, location, and/or cross section shape of a stream channel. Stream channelization changes the hydraulic flow characteristics of the stream, reduces channel complexity and diversity, and can include bank stabilization on one or both banks of the channelized waterway. Stream channelization substantially reduces natural stream functions, while bank stabilization by itself does not.

We do not agree that this NWP should be limited to vegetative or bioengineering techniques. In many areas, those techniques will not provide adequate protection to the bank, especially in those waters where banks are subjected to substantial wave energy, such as coastal shorelines. In those areas, hard bank stabilization techniques may be the only feasible option. The pre-construction notification requirements in this permit apply to specific situations not directly related to the type of bank stabilization used (e.g., hard or vegetative). We do not believe that the use of bank hardening methods, in and of itself, requires a pre-construction notification, nor do we believe that pre-construction notification requirements should be waived simply because a project that exceeds the 500 foot or one cubic yard limit, or that involves discharges into special aquatic sites, uses vegetative or bioengineering techniques. However, for such projects, the use of more environmentally friendly methods may well be a factor in the district engineer's decision regarding whether or not to grant the requested waiver.

One commenter suggested that in order to make the one cubic yard per running foot limit more practical for bank construction methods in streams of significant size, this limit should only apply to the amount of material placed from the ordinary high water mark to the streambed, and not to anything below or above those planes. Alternatively, the commenter suggested that this limit could be adjusted to increase proportionally with increasing channel depth at the ordinary high water mark, so that stream magnitude is taken into account. One commenter indicated that the language limiting the placement of erodible material may discourage plantings on riprap, since the soil used for those plantings could be washed away during high flows. One commenter said that NWP 13 should not be used with other permits. Another commenter suggested that this NWP be conditioned to prohibit the use of waste concrete for bank stabilization material, since it may adversely affect the environment. One commenter recommended modifying paragraph (d) (now designated as paragraph (e)) to state that the placement of material may not impair surface water flow into or out of any water of the United States. In the September 26, 2006, **Federal Register** notice, this paragraph referred only to wetlands.

The cubic yard limit for this NWP, along with the waiver provision, is adequate to provide flexibility while protecting the aquatic environment and ensuring that authorized activities result in minimal adverse effects. We are retaining the language in paragraph (a), to help protect water quality. Bank stabilization projects involving the installation of plant materials on riprap may be authorized by this NWP, but erodible materials should be properly stabilized within the riprap or stabilized by other means. This NWP can be used with other NWPs to authorize single and complete projects that result in minimal individual and cumulative adverse effects on the aquatic environment, provided the permittee complies with general condition 24, Use of Multiple Nationwide Permits. General condition 6, Suitable Material, addresses the use of suitable material for discharges of dredged or fill material into waters of the United States. This general condition prohibits the use of materials that contain toxic pollutants in toxic amounts. We have modified paragraph (e) by replacing the word ''wetland'' with ''water of the United States'' to help ensure that surface water flows are maintained.

This NWP is reissued with the modifications discussed above.

NWP 14. *Linear Transportation Projects.* We proposed to modify this NWP to limit stream channel modifications to the minimum necessary to protect the linear transportation project and state that the NWP does not authorize temporary construction, access, and dewatering activities necessary to construct the linear transportation project.

Several commenters supported our proposal to change the first sentence of this NWP to refer to ''linear transportation projects'' instead of ''linear transportation crossings.'' One commenter said that this sentence should be consistent with the definition of ''single and complete project.''

We are retaining the proposed language in the first sentence of this NWP. However, in the case of linear transportation projects, a ''single and complete project'' consists of a single crossing of a water of the United States, or more than one crossing at the same location (see the definition of ''single and complete project'').

One commenter recommended reducing the acreage limit to ⅓ acre. One commenter said that this NWP should not be used in tidal waters. Another commenter stated there should be a condition requiring culverts to allow for unimpeded upstream and downstream passage of fish as well as

the passage of substrate and wood expected to be carried by 100 year flow events.

We do not agree that it is necessary to reduce the acreage limit to ⅓ acre for all activities authorized by this NWP. The ½ acre limit for losses of non-tidal waters and the ⅓ acre limit for losses of tidal waters, in addition to the pre-construction notification requirements and other general conditions, will ensure that this NWP authorizes linear transportation projects that result in minimal adverse effects on the aquatic environment. General condition 2, Aquatic Life Movements, states that no activity may disrupt the necessary life cycle movements of aquatic species, including those species that normally migrate through the area. General condition 9, Management of Water Flows, states that, to the maximum extent practicable, the activity must not restrict or impede the passage of normal or high flows, unless the primary purpose is to impound water.

A large number of commenters objecting to the removal of the language regarding authorization of temporary construction, access, and dewatering activities necessary to construct the linear transportation project, because NWP 33 requires pre-construction notification for all activities. One commenter suggested that the Corps expressly state that all activities authorized previously under this NWP remain authorized.

We have decided not to remove the language authorizing the temporary construction, access, and dewatering activities from this NWP. In addition, we have added a new paragraph to this NWP to help ensure that temporary impacts associated with NWP 14 activities are minimized, and that temporary fills are removed and affected areas are returned to pre-construction elevations and revegetated as appropriate.

One commenter said that this NWP should not authorize the construction of new transportation or spur projects, because potential future development activities might occur after the transportation project is constructed. One commenter stated that the NWP should be applicable only to the expansion, modification or improvement of existing linear transportation projects. One commenter recommended modifying the pre-construction notification thresholds to clarify whether temporary losses require pre-construction notification.

This NWP authorizes the construction, expansion, modification, or improvement of linear transportation projects that result in minimal individual and cumulative adverse effects on the aquatic environment. It does not prohibit new projects simply because there may be future development activities. It would be impractical to condition use of this NWP on consideration of hypothetical effects of potential future activities. Such effects will be addressed through applicable permitting requirements if and when future activities are proposed.

The acreage-based pre-construction notification threshold applies only to permanent losses of waters of the United States. However, pre-construction notification is also required for any discharges of dredged or fill material into special aquatic sites, whether those discharges are permanent or temporary.

One commenter stated that this NWP should not authorize bridge footings, because they result in a significant impact to stream habitat and that edge habitat is lost to hardened banks. One commenter asked whether this NWP authorizes cul-de-sacs and hammerhead turnarounds.

Bridge footings are necessary to construct certain types of linear transportation projects, and they usually result in minimal adverse effects on the aquatic environment. The pre-construction notification thresholds for this NWP will ensure that district engineers will review those activities with bridge footings that have the potential to result in more than minimal adverse effects on the aquatic environment. Bridge footings are generally confined to narrow stream segments, so only small amounts of edge habitat will be lost as a result of the construction of a bridge footing. In addition general condition 3, Spawning Areas, prohibits the physical destruction of important spawning areas that could result from these activities. Discretionary authority will be asserted in those cases where the construction of bridge footings will result in more than minimal individual and cumulative adverse effects on the aquatic environment. Cul-de-sacs and hammerhead turnarounds may be authorized by this NWP, as they are part of the street network used for transportation.

Another commenter recommended adding storm water management features to the list of examples of activities authorized by this NWP. One commenter requested clarification as to whether stream modifications, encroachments, and relocations associated with highway construction are authorized. We received several comments on the proposed language limiting stream channel modifications to the minimum necessary to construct or protect linear transportation projects. One commenter objected to the proposal, stating that it would limit public transportation safety requirements by adding unnecessary restrictions.

Storm water management features are authorized by this NWP, provided they are integral features of the linear transportation project. If they are not, then they may be authorized by NWP 43, regional general permits, or individual permits. Stream channel modifications are authorized by this NWP provided they are minimized and conducted in the immediate vicinity of the project. Otherwise, they require authorization under another NWP, a regional general permit, or an individual permit. This provision allows most linear transportation projects to use this NWP while ensuring that they result in minimal adverse effects on the aquatic environment.

Two commenters requested further clarification on the meaning of the phrase ''minimum necessary.'' Another commenter recommended modifying this NWP to require these activities to result in no changes to the course or hydrology of streams.

The phrase ''minimum necessary'' refers to minimizing the loss of waters of the United States needed to protect the project. This is determined based on case specific circumstances such as the environmental setting and the nature of the project. General condition 9, Management of Water Flows, requires maintenance of the course, condition, capacity, and location of open waters, such as streams, to the maximum extent practicable. The construction of linear transportation projects over streams usually results in some unavoidable changes to stream morphology, but the conditions of the NWP authorization require such impacts to be minimized to the maximum extent practicable.

Three commenters recommended adding a 300 linear foot limit to this NWP, and another commenter suggested a 2,000 linear foot limit. One commenter recommended a 200 linear foot limit.

This NWP does not have a linear foot limit for stream bed impacts. Instead, the acreage limits for this NWP are sufficient to ensure that this NWP authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. A 200 linear-foot limit was previously removed from NWP 14 to eliminate varied interpretations and to simplify the basis for use of the permit.

This NWP is reissued with the modifications discussed above.

NWP 15. *U.S. Coast Guard Approved Bridges.* There were no changes proposed for this NWP. One commenter asked why this permit only applies to U.S. Coast Guard approved bridges and not all bridges. The commenter suggested that the Corps simplify the permit by revising it to include construction, repair, seismic retrofit, or widening of any bridge, regardless of whether it spans navigable waters. Another commenter suggested modifying this NWP to allow the use of another NWP to authorize the causeways and approach fills.

The authority to authorize bridges or causeways across navigable waters of the United States is held by the U.S. Coast Guard. This NWP provides authorization under Section 404 of the Clean Water Act for discharges of dredged or fill material into waters of the United States associated with the construction of those bridges. The construction, repair, seismic retrofit, or widening of these bridges must be approved by the U.S. Coast Guard. The environmental review conducted by the U.S. Coast Guard during its authorization process will normally suffice for those related activities that require the section 404 authorization provided by this NWP. District engineers can exercise discretionary authority when the adverse effects to the aquatic environment may be more than minimal. Bridges constructed across section 404 waters may be authorized by NWP 14, a regional general permit, or an individual permit. For the purposes of clarification, the last sentence of this NWP is revised to read as follows: ''Causeways and approach fills are not included in this NWP and will require a separate Section 404 permit.''

This NWP is reissued with the modification discussed above.

NWP 16. *Return Water From Upland Contained Disposal Areas.* We proposed to rearrange the text of this NWP so that it will be consistent with the format of the other NWPs. No substantive changes were proposed to the text of the NWP. One commenter recommended that the permit require the issuance of a National Pollutant Discharge Elimination System permit under Section 402 of the Clean Water Act, in case the return water contains pollutants entrained in the dredged material. This commenter expressed concern that the discharge would not be properly considered through the water quality certification process under Section 401 of the Clean Water Act. One commenter said that the last sentence should be modified to acknowledge that incidental fallback would not require a section 404 permit.

Return water from upland contained disposal areas is administratively defined as a discharge of dredged or fill material subject to section 404. Therefore, section 401 water quality certification is the appropriate process for determining whether the discharges associated with the return water comply with the appropriate water quality standards. It is not necessary to qualify the citation of 33 CFR 323.2(d). District engineers will use that definition to determine whether section 404 permits are required for dredging activities. We believe that the inclusion of the citation provides a more complete description of activities that may constitute a discharge of dredged material.

The NWP is reissued without change.

NWP 17. *Hydropower Projects.* We proposed to rearrange the text of this NWP, without modifying any of its terms or its scope. One commenter stated that the NWP should not apply to hydropower projects exempt from Federal Energy Regulatory Commission licensing requirements. This commenter remarked that an individual permit should be required to ensure that impacts to aquatic resources are evaluated.

We are retaining the applicability of this NWP to hydropower projects that are exempt from the licensing requirements of the Federal Energy Regulatory Commission. We believe the pre-construction notification process will provide adequate means for district engineers to assess the impacts to the aquatic environment and, if necessary, exercise discretionary authority and require an individual permit for a particular activity. In addition, division and district engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively.

The NWP is reissued as proposed.

NWP 18. *Minor Discharges.* We proposed to modify this NWP by applying the 1/10 acre limit to all losses of waters of the United States, not just special aquatic sites.

Several commenters expressed support for the proposed revisions. A few commenters said that this NWP does not comply with the ''similar in nature'' requirement for general permits. Other commenters asserted that the cumulative impacts resulting from the use of this NWP would not be minimal. Another commenter said that this NWP should not authorize discharges into waters inhabited by species of anadromous salmon.

We believe that the minor scope and nature of the types of discharge activities authorized by this NWP are sufficient to establish that the activities are similar in nature. We also maintain that the discretion vested in district engineers to issue case-specific special conditions, including requirements for appropriate and practicable mitigation, coupled with the ability of division engineers to impose regional conditions for certain activities will ensure minimal adverse effects on the aquatic environment, individually and cumulatively. We disagree that activities in areas accessible to anadromous salmonids will necessarily result in more than minimal impacts. Permittees must adhere to all applicable NWP general conditions including general condition 2, Aquatic Life Movements, and general condition 3, Spawning Areas. The terms and conditions of this NWP, as well as the ability for district engineers to exercise discretionary authority, will help ensure that the activities authorized by this NWP result in minimal adverse effects to anadromous salmon.

Several commenters remarked that the wording of NWP 18 is confusing and suggested clarifications be provided. One commenter stated the language pertaining to ''losses'' is vague and suggested we clarify the text by adding ''permanent'' losses.

We do not agree that additional modifications are necessary to clarify the terms and conditions of this NWP. The proposed revisions to the text of the NWPs were made to remove redundant language and simplify the wording to make it clearer and more concise. The term ''loss of waters of the United States'' is defined in the ''Definitions'' section which explains that the loss of waters of the United States includes the filled area and other waters that are permanently adversely affected by flooding, excavation or drainage because of the regulated activity. Therefore, we do not agree that elaboration on the term ''losses'' within the text of this NWP is warranted.

Some commenters objected to the 1/10 acre limit as an unnecessary administrative burden and unduly restrictive when coupled with the pre-construction notification requirement.

We do not agree that the 1/10 acre limit will result in an unnecessary administrative burden or be unduly restrictive for the regulated public. While we recognize that the 1/10 acre threshold may preclude use of this NWP for some activities, we have determined that activities that result in loss of more than 1/10 acre of waters of the United States are not necessarily ''minor'' within the meaning of this permit. We believe the reduced scope of the permit

is justified by the enhanced protection afforded to the aquatic environment and will better ensure that authorized activities result in no more that minimal effects.

Several commenters asserted that a 25 cubic yard threshold is sufficient to ensure minimal adverse impacts on the aquatic environment. One commenter suggested that the volume criteria reflect a net total volume of discharge or excavation to allow for the management of volumes greater than 25 cubic yards as long as the net total discharged or excavated does not exceed 25 cubic yards.

The 25 cubic yard limit for excavating material, or discharging dredged or fill material, below the plane of the ordinary high water mark or high tide line is necessary to ensure that this NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. Applying this 25 cubic yard limit to net volumes may result in more than minimal adverse effects, because it could allow substantially larger volumes of material to be excavated or discharged. Excavation or discharges of greater than 25 cubic yards in waters of the United States may be authorized by other types of permits, including regional general permits and individual permits. The language in the September 26, 2006, proposal also helps simplify the implementation of this NWP, by providing clear, easily measured limits and making it easier to enforce.

Another commenter suggested this NWP be simplified to authorize only discharges of dredged or fill material and exclude excavation activities in section 10 waters since the Corps does not regulate excavation activities under section 404 that result only in incidental fallback.

Excavation activities may result in discharges of dredged or fill material into waters of the United States that require section 404 permits (see 33 CFR 323.2(d)). Therefore, it is not appropriate to remove references to excavation from this NWP. Unless exempted under Section 404(f) of the Clean Water Act, excavation activities in waters of the United States that result in more than incidental fallback require section 404 authorization. Minor discharges authorized under NWP 18 often involve excavation activities that result in more than incidental fallback and would therefore constitute a discharge that is regulated under section 404.

One commenter recommended NWP 18 be specifically prohibited from use for any new residential and commercial construction and that impacts resulting from new residential or commercial development be subject to NWPs 29 and 39, respectively.

This NWP authorizes minor discharges of dredged or fill material in waters of the United States provided that the activity complies with the specific terms and conditions of the NWP and all applicable NWP general conditions. The applicability and verification of the use of this NWP is at the discretion of district engineers based on case-specific circumstances. Therefore, we believe it would be inappropriate to prohibit its use for new residential and commercial development in the absence of case-specific information. We note that the limits on use of this permit are more restrictive than the limits on use of NWPs 29 and 39, so developers could only use this permit if their impacts were smaller than those that could be potentially authorized by these other NWPs.

One commenter recommended including language stating that the discharge will not result in significant stream geomorphologic or hydrologic alteration, and that the discharge will not be placed for the purpose of, or result in, impeding navigation.

General condition 9, Management of Water Flows, requires maintenance of the course, condition, capacity, and location of open waters, such as streams, to the maximum extent practicable. Concerns regarding potential impacts to navigation are addressed by general condition 1, which states that no activity may cause more than minimal adverse effects on navigation.

This NWP is reissued as proposed.

NWP 19. *Minor Dredging.* We proposed to remove the phrase ''as part of a single and complete project,'' since that requirement applies to all NWPs and it is not necessary to include that phrase in the text of this NWP. One commenter supported the proposed change.

Another commenter said that the phrase ''including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year'' is not appropriate and recommended that it be removed. The commenter asserted that the Corps should not prohibit the use of this NWP in areas where submerged aquatic vegetation was present in the past, but there is no longer evidence that it is still present.

We are retaining this provision of the NWP, since areas where submerged aquatic vegetation is documented to exist have a high potential for those species to return to the area. In a given year, poor water quality may prevent submerged aquatic vegetation from inhabiting that area, but once water quality improves those plants may grow back.

One commenter was concerned about authorizing minor dredging activities in waters containing habitat features for various life stages of anadromous fish, including complex wood structures and edge habitats used for juvenile rearing and adult holding. The commenter indicated that this NWP should not be used to authorize dredging in waters that are inhabited by anadromous salmonids.

The terms and conditions of this NWP, as well as the ability for division and district engineers to exercise discretionary authority or condition this NWP, are sufficiently protective of species of anadromous salmon. General condition 2, Aquatic Life Movements, specifies no activity may disrupt the necessary life cycle movements of the aquatic species indigenous to the waterbody. In addition, general condition 3, Spawning Areas, states that activities in any spawning areas must be avoided to the maximum extent practicable during spawning seasons and the specific terms of this NWP prohibit its use in anadromous fish spawning areas at all. Additional time of year restrictions may be imposed by division and district engineers to reduce or avoid impacts to juvenile salmonids utilizing these areas.

Other commenters expressed concerns that NWP 19 does not authorize activities that are similar in nature with minimal impacts. One commenter questioned whether this NWP can be used for removal of a sandbar across the mouth of a navigable waterway. A couple of commenters questioned why this NWP applies to section 404 waters when the text of the permit states that it only authorizes minor dredging activities in section 10 waters. One commenter said that this NWP should not authorize dredging activities in non-navigable waters, including small streams, because of the greater potential for more than minimal adverse environmental effects.

We believe that the minor scope and nature of the types of dredging activities authorized by this NWP are sufficient to establish that the activities are similar in nature. This NWP can only be used to authorize the removal of materials from waters subject to Section 10 of the Rivers and Harbors Act of 1899. Dredging activities in section 10 waters may require section 404 authorization, which may be provided by this NWP. In waters of the United States that are not

subject to section 10 jurisdiction (i.e., section 404-only waters), NWP 18, regional general permits, or individual permits may be used to authorize those activities. This permit could be used to remove a sandbar across the mouth of a Section 10 water provided the activity met all of the other conditions for its use.

This NWP is reissued without change.

NWP 20. *Oil Spill Cleanup.* We did not propose any substantive changes to this NWP. One commenter requested clarification of the applicability of NWP 38 for emergency response to an oil release in waters of the United States from electrical equipment that is not covered by a Spill Prevention, Control, and Countermeasure (SPCC) Plan. These releases are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. Because the activities are not included in a SPCC Plan, they were not authorized by the previous or the proposed versions of NWP 20. Since the required work must be initiated within 24 or 48 hours of discovery of the release, the commenter requested that either NWP 20 be modified or the pre-construction notification requirement for NWP 38 be removed, to allow these activities to take place in a timely manner.

We agree with the commenter's concern but do not think it is appropriate to remove the pre-construction notification requirement from NWP 38. We are thus modifying NWP 20 to authorize the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761.

This NWP is reissued with the modification discussed above.

NWP 21. *Surface Coal Mining Operations.* We proposed to change the title of this NWP. We also proposed allowing authorization of projects by this NWP that were currently being processed as part of an integrated permit processing procedure in lieu of an authorization from the Department of Interior, Office of Surface Mining (OSM) or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act (SMCRA) of 1977. The Corps, the Environmental Protection Agency, OSM, and the U.S. Fish and Wildlife Service entered into a Memorandum of Understanding on February 8, 2005. This MOU envisioned a collaborative process in which the SMCRA authority chooses to be the lead agency in coordinating interagency review of applications for surface coal mining operations while preserving the authorities and responsibilities of each agency for permit decisions.

We believe there may be some confusion regarding the intent of the term ''surface'' coal mining operations. The Corps did not intend to restrict use of this NWP to only a particular type of coal mining technique. Any coal mining activities can be considered for authorization under NWP 21 to the extent the activities occur on the surface of the land. In particular, while discharges associated with underground coal mining activities now require authorization under NWP 50 rather than NWP 21, surface processing activities associated with underground coal mining may still be authorized by this permit provided they meet the conditions for its use.

Proposed Limits

There were numerous comments regarding limitations on NWP 21. A number of commenters recommended limits on the length of stream that could be filled under NWP 21, and other commenters recommended an overall limit on impacts to waters of the United States of ½ acre. One commenter suggested that the threshold limits should be 2 acres and 1,500 linear feet. Three commenters recommended a 300 linear foot limit on filling streams and a ½ acre limit on impacts to all waters, and that these impacts could not be waived by the district engineer. Two other commenters concurred with the 300 foot limit but also suggested not allowing the use of NWP 21 in watersheds where the cumulative amount of filled streams was already causing more than minimal harm. Several commenters stated that any linear foot limits should apply to all streams, ephemeral, intermittent, and perennial. One commenter said that this NWP should not authorize discharges into perennial streams. Another commenter stated that the use of NWP 21 should not be allowed if more than 10 percent of the headwater streams in the watershed had been filled or otherwise degraded. One commenter stated that a 250-acre watershed limit was appropriate but that drainage areas was not the only factor that should be considered in determining if a project should qualify for NWP 21.

There were also a substantial number of comments that objected to limitations on NWP 21. Many commenters stated that acreage limits that may be appropriate for eastern states would not be appropriate for western states and would be unnecessarily restrictive. Two commenters suggested issuing two versions of NWP 21, one for the western United States and another for the eastern United States. They discussed the differences in mining and reclamation techniques and believed the Corps should recognize these differences by establishing two NWPs for coal mining. One commenter noted that acreage limits need to be larger for the western United States. A number of commenters suggested that regional conditions could be used to address the issue of limits. Several commenters noted that there was no compelling scientific or environmental basis or rationale to establish limits on NWP 21. They noted that due to hydrologic, climatic, and ecological variations, there was no defensible way to establish a specific threshold below which impacts could be said to be ''minimal'' across the vastly differing geographical and hydrological regimes where mining occurs. Several commenters stated that arbitrary and unnecessary thresholds would slow the permit process and result in a loss of coal production, which could be construed as a ''takings'' that violated substantive due process rights. Other commenters noted that limiting the use of NWP 21 would result in a loss in royalty and tax revenues and increases to the cost of the nation's energy supply by restricting coal production. One commenter noted that it would take more of the Corps' limited resources to review surface mining projects as individual permits. One commenter stated that thresholds would also impact the Corps' ability to comply with Executive Order 13212, which requires federal agencies to expedite their review of permits for energy related projects. One commenter noted that if a 2-acre limit were established for NWP 21, more than 60 percent of the nation's coal production would not be eligible for the NWP. One commenter stated that a 3-acre limit in the western United States would have a significant impact on Western mining operations. One commenter noted that if a limit of less than 50 acres was adopted, the Corps' would not achieve its goal of focusing its limited resources on projects that have the potential for more environmentally damaging adverse effects. Two commenters believed safeguards were in place to ensure impacts do not cause more than minimal individual or cumulative effects. They noted that general condition 20, Mitigation, requires compensatory mitigation to offset the adverse effects to the aquatic environment, and that there was no need for arbitrarily chosen acreage limits because the mitigation requirement counterbalances all adverse effects.

This NWP is used to provide section 404 authorization for surface coal mining activities that have also been authorized by the Office of Surface Mining or states with approved programs under Title V of the Surface Mining Control and Reclamation Act (SMCRA). Previously, there have been no limits associated with impacts to waters of the United States for NWP 21. This was based partly on the belief that the analyses and environmental protection performance standards required by SMCRA in conjunction with the pre-construction notification requirement, are generally sufficient to ensure that NWP 21 activities result in minimal individual and cumulative adverse impacts on the aquatic environment.

Furthermore, we believe the change in NWP 21 in 2002, which requires not only notification to the Corps for all projects that may be authorized by this permit but also explicit authorization from the Corps before the activity can proceed, has strengthened the environmental protection for projects authorized by this permit. One commenter requested that this requirement be removed from this NWP. However, we continue to believe that this 2002 change helps ensure that no activity authorized by this permit will result in greater than minimal adverse impacts, either individually or cumulatively, on the aquatic environment, because it requires a case-by-case review of each project. If the district engineer determines through this case-by-case review that the activity has the potential to result in more than minimal adverse effects to the aquatic environment, he or she can exercise discretionary authority to require an individual permit. Also, because of the case-by-case review and the requirement for written verification, we do not agree that it is necessary to prohibit discharges of dredged or fill material into perennial streams.

Lastly, the Corps recognizes that there are vast differences in coal mining techniques not only between the western and eastern parts of the United States, but also within the Illinois Coal Basin and the Appalachian Coal Fields themselves. There are also considerable differences in geological, topographical, climatological, hydrological and ecological regimes in the areas where coal resources are located across the United States. Furthermore, no specific scientific or environmental basis for determining a uniform national limit on NWP 21 was submitted for consideration. As noted above, there were several comments suggesting specific limits but no ecological rationale was supplied to support these specific limits. Several commenters did submit information from the Programmatic Environmental Impact Statement (PEIS) for mountaintop mining/valley fill. However, the PEIS did not support or determine appropriate limits for NWP 21. Based on these considerations along with the fact that the impacts to waters vary greatly depending on the mining techniques and the environmental factors in the area, we have determined that establishing a specific threshold limit would not be practical on a national basis. We believe that regional conditions, as appropriate, and site-specific review of each pre-construction notification will ensure that NWP 21 authorizes activities with no more than minimal adverse effects on the aquatic environment, individually and cumulatively. The Corps has determined that it is both efficient and environmentally protective to issue an NWP 21 that can be used to authorize most activities that have no more than minimal adverse effects on the aquatic environment and allow division engineers to establish regional conditions that determine appropriate limits for impacts to waters based on the functions and values of aquatic resources within their division.

Regional Conditions

There were three commenters who noted that the division engineer has the discretion to add regional terms and conditions to NWP 21 and that acreage limitations should be determined at the regional level. The Corps agrees, based on the discussion above regarding limitations, that regional conditions are the best way to address regional concerns regarding surface coal mining activities and NWP 21. Division engineers can add regional conditions to any NWP to further restrict the use of the NWP to ensure that the NWP authorizes only activities with no more than minimal adverse effects on the aquatic environment in a particular watershed or other geographic region. The division engineer cannot modify the NWP by adding regional conditions to make the NWP less restrictive (see 33 CFR 330.1(d)). The use of regional conditions recognizes that functions and values of aquatic resources differ greatly across the country.

Discretionary Authority

Three commenters noted that NWP 21 allows the Corps to exercise discretionary authority during the pre-construction notification review process for any project which has the potential to cause more than minimal individual and cumulative adverse impacts on the aquatic environment.

We agree with these commenters. The pre-construction notification requirements of all NWPs allows for a case-by-case review of activities that have the potential to result in more than minimal adverse effects to the aquatic environment. If the adverse effects on the aquatic environment are more than minimal, then the district engineer can either add special conditions to the NWP authorization to ensure that the activity results in no more than minimal adverse environmental effects or exercise discretionary authority to require an individual permit. While many NWPs allow the permittee to assume authorization if he or she has not heard back from the Corps within 45 days of submitting a complete pre-construction notification, NWP 21 requires written verification before the project can proceed. This ensures that adequate time is available to the Corps to review the extensive documentation that pre-construction notifications for NWP 21 often include, coordinate with other agencies as necessary, and determine whether exercise of discretionary authority is necessary to ensure no more than minimal effects.

Scope of Analysis

One commenter stated that the scope of analysis for NWP 21 review should extend beyond the effects of fills in waters. Another commenter noted that the Clean Water Act is clear that general permits may only be issued if the permitted activities have minimal impacts on the environment as a whole and not just the aquatic environment.

Several commenters stated that NWP 21 should not be reissued, in order to protect wildlife habitat, outdoor recreation, the quality of life in rural communities and environmental integrity. A myriad of comments were received itemizing impacts related to authorizations associated with NWP 21. These impacts included irreversible damages to the American people, the destruction of lives and the natural and cultural heritage of Appalachia, Montana and Wyoming, loss of hunting opportunities, the exploitation of impoverished areas by large corporations, global warming, landslides, blasting, truck traffic on roads not designed or built to handle heavy loads, harm to bird populations, destruction of valuable hardwood trees, loss of medicinal plants, affects on the tourism/vacation home industry, and local sickness. Several commenters stated that mined areas cannot be restored to pre-mining conditions, such as native forest. Several commenters

expressed concern about coal slurry damaging downstream areas.

All of these impacts are outside of the Corps' scope of analysis pursuant to the National Environmental Policy Act (NEPA). The Corps evaluation of coal mining activities is focused on impacts to aquatic resources. Mining in general is permitted under a separate Federal law, the Surface Mining Control and Reclamation Act. Impacts associated with surface coal mining and reclamation operations are appropriately addressed by the Office of Surface Mining or the applicable state agency. Under these circumstances, the Corps' NEPA implementing regulations clearly restrict the Corps' scope of analysis to impacts to aquatic resources.

Integrated Permit Process

Several commenters supported the Memorandum of Understanding (MOU) between the EPA, Corps, OSM and the USFWS regarding the integrated permit process for coal mining mentioned in the proposed NWP language. Some suggested the integrated permit process along with the Standard Operating Procedure (SOP) for NWP 21 be mandatory under NWP 21. Some commenters stated that the integrated permit process does not eliminate the dual review of section 404 and SMCRA as the MOU intended, while other commenters stated that the integrated permit process was unlawful because through it, the Corps has delegated its section 404 authority to the states processing the SMCRA permit applications. One of the commenters supporting the MOU stated that the current integrated permit process did not meet the goal of the MOU, as evidenced by its failure in Ohio, since dual reviews were still being undertaken by the regulatory agencies.

The MOU recommends that Federal and state agencies coordinate reviews of coal mining permit applications, with the SMCRA agency as the lead agency. Currently, in areas that have developed or are in the process of developing an integrated permit process, the agencies have elected to make the process voluntary. The integrated permit process does not eliminate the regulatory responsibilities of the participating agencies, but allows the various permit applications to be reviewed concurrently while utilizing information from one application to fulfill required sections of other applications, where appropriate. The process allows for timelier reviews while providing the framework for better environmental protection. The Ohio integrated permit process is still in use for those who choose to use it.

State Programmatic General Permits and Regional General Permits

Several commenters suggested that a state programmatic or regional general permit or other methods (*e.g.*, a national MOU) be developed to reduce the duplication of effort by the regulatory agencies, therefore reducing cost and delays in receiving authorizations.

State programmatic and regional general permits are developed at the district level. The Corps supports and participates in such efforts where possible.

Surface Mining Control and Reclamation Act

Several commenters stated that coal mining is the most environmentally regulated activity, and SMCRA, along with Sections 401 and 402 of the Clean Water Act, already require analyses of all of the factors addressed under Section 404 of the Clean Water Act. Therefore, as the above-referenced programs already regulate impacts to aquatic resources, including impacts related to water quality, endangered species, historic properties, and the hydrologic regime, further review by the Corps only creates an additional administrative burden without any real benefits.

The Corps understands coal mining is covered by many environmental regulations; however the Corps has determined that SMCRA, in its current form, does not remove the need, either legally or substantively, for independent authorization under Section 404 of the Clean Water Act. Consequently, this NWP does not duplicate the SMCRA permit process. The Corps continues to work with the other agencies to avoid potential duplication of efforts and uses appropriate work and studies done by or for other agencies (*e.g.*, surveys/findings under the Endangered Species Act or Section 106 of the National Historic Preservation Act as well as SMCRA permit documentation) in its analysis of the proposed project.

Mitigation

Several commenters stated that mitigation done for NWP 21 is scientifically indefensible and, absent such mitigation, the projects authorized under NWP 21 have more than minimal adverse effect and are therefore impermissible. They stated that current mitigation projects have so far been unsuccessful and referenced a court case in the Southern District of West Virginia (*Ohio Valley Environmental Coalition* v. *Bulen*), where they noted that a Corps official stated that he did not know of a single instance of successful headwater stream creation. Also, the commenters stated that the Corps did not include any specific guidelines for how to assess stream function in order to determine the adequacy of compensatory mitigation. They also stated that the Corps has not shown that mitigation will offset the impacts authorized under NWP 21 or that off-site enhancement of streams would fully compensate for functions of streams that are destroyed. Other commenters stated that the Corps mistakenly allows the mitigation requirements of SMCRA and state water quality laws to satisfy the independent requirements of Section 404 of the Clean Water Act. They stated that allowing a permittee to claim a compensatory mitigation or reclamation activity already required under SMCRA as compensatory mitigation under the Clean Water Act is ''double-counting'' and improperly blurs the requirements of sequencing (*i.e.*, avoidance, minimization, mitigation) imposed under the 404(b)(1) guidelines. Other commenters recommended that mitigation of 1:1 should be required in order to achieve no net loss, and that mitigation also be required for potential, as well as actual, impacts. Several commenters stated that final reclamation of wetland habitat will most likely exceed the required compensatory mitigation.

In order to ensure that an activity results in no more than minimal adverse effect on the aquatic environment, the Corps will add permit conditions that require compensatory mitigation that meets specified success criteria. The Corps will generally require the permittee to monitor the mitigation site for five years and, if the mitigation site does not meet the success criteria at that time, remediation or additional mitigation will be required. This ensures that the authorized activity will not result in a net loss in aquatic functions. The Corps has increased its compliance efforts to ensure that projects authorized by DA permits are constructed as authorized and that mitigation is successful.

We are currently developing new stream functional assessment protocols to identify and quantify the functions lost through authorized impacts and the functions gained or enhanced through mitigation. We removed the language from the proposed NWP 21 that required the applicant to furnish a SMCRA or state-approved mitigation plan. The Corps recognizes that SMCRA does not require ''mitigation'' per-se, but does require ''reclamation/restoration'', and that some states require ''mitigation'' above Corps requirements.

The Corps coordinates with the SMCRA and state resource agencies to achieve appropriate aquatic restoration on mine sites, which can reduce or eliminate off-site compensatory mitigation needs. The Corps does not consider this ''double-counting'', because the areas restored are only counted once in the replacement of aquatic resource functions. As long as the functions lost as a result of the permitted activity are mitigated through the onsite restoration or enhancement, it does not matter if the restoration also meets other goals unrelated to the Section 404 impacts. General condition 20 establishes the framework for achieving no net loss of waters/wetlands, as well as the sequential review of mitigation on-site. The Corps takes into account the fact that, in certain areas and circumstances, any Corps compensatory mitigation requirement may be fully encompassed or exceeded by requirements under other authorities. As long as the impacts to the aquatic environment are fully mitigated, the Corps will not require additional compensation.

Withdraw NWP 21

Several commenters requested that NWP 21 be withdrawn and that the Corps consider authorizations under state or regional permits where cumulative impacts and mitigation measures can be evaluated on a more focused level that assures minimal impacts on the environment.

Division and district engineers have the authority to revoke or modify any or all of the NWPs and require authorizations for proposed projects by other general permits or individual permits. This should be determined on a local level.

Independent Evaluation

Several commenters stated that the burial or other degradation of hundreds of miles of Appalachian streams from mining demands a thorough, independent review, public notice, and analysis of alternatives and minimization, which is provided only through the individual permit process. A few commenters stated that coal mining rearranges the natural landscape and deserves to be studied on a case-by-case basis. One commenter stated that each project should be independently evaluated with proper safeguards in place to include meaningful bonds that would be sufficient to cover remediation costs when companies declare bankruptcy.

A careful case-specific determination that a project will result in no more than minimal impacts is necessary for a project to be authorized by this NWP. The pre-construction notification process for NWP 21, which requires the applicant to wait until he or she receives verification from the Corps, provides this case-specific determination. If the District Engineer determines that a particular proposal will result in more than minimal adverse environmental effects, he will assert discretionary authority and require an individual permit. Bonding is covered under general condition 20. The Corps notes that the SMCRA permitting process provides for public notice and comment on all coal mining permits.

Minimal Adverse Effects

A few commenters stated that the Secretary of the Army can only issue NWPs by making an up-front determination that the activities authorized by each NWP category will cause only minimal adverse effects and the Corps cannot ignore harm already done when assessing cumulative impacts. The commenters stated that the Corps has no reasoned basis or substantial evidence to support its determinations that the individual or cumulative environmental impacts associated with NWP 21 will be minimal. Several commenters similarly stated that compensatory mitigation could not be used to reduce the net adverse impacts to the minimal level in order to qualify for general permits. Therefore, NWP 21 exceeds the definition of minimal adverse environmental effects and all coal mining should be reviewed under the individual permit process. A number of commenters stated that surface coal mining results in significant ecological damage to headwater stream systems, when considered both individually and cumulatively, and it cannot be reasonably assumed that those stream losses can be mitigated into insignificance.

We believe our process for NWP 21 ensures that activities authorized by the NWP result in no more than minimal adverse impacts to the aquatic environment because each project is reviewed on a case-by-case basis and the district engineer either makes a minimal impacts determination on the project or asserts discretionary authority and requires an individual permit. Additionally, as noted above, division engineers can add regional conditions to any NWP to further restrict the use of the NWP to ensure that the NWP authorizes only activities with no more than minimal adverse effects on the aquatic environment in a particular watershed or other geographic region. Each district tracks losses of waters of the United States authorized by Department of the Army permits, including NWPs, as well as compensatory mitigation achieved through aquatic resource restoration, creation, and enhancement.

In addition, we believe that the Corps can rely on mitigation in making a minimal adverse environmental effects determination.

One commenter requested that the Corps clarify what constitutes a ''single and complete surface coal mining operation'' since approved mines can expand through either the addition of substantial acreages or the addition of small acreages (incidental boundary revisions). This commenter asked whether all revisions, including incidental boundary revisions, are considered as single and complete coal mining operations.

District engineers use the criteria in the definition of ''single and complete project,'' which is found in the ''Definitions'' section of the NWPs, when identifying single and complete coal mining operations. District engineers will determine, on a case-by-case basis, whether the expansion of an existing mine constitutes a separate single and complete project.

Impacts From NWP 21 Activities

Many commenters opposed the reissuance of NWP 21 because of the potential impacts to the aquatic environment and water resources. Several commenters expressed concerns about impacts to water supplies and drinking water, downstream water uses, and recreational opportunities such as fishing. Concerns were also expressed about water pollution, the effects of burying streams that support aquifers, and loss of streams and wetlands. This NWP requires compliance with all of the general conditions for the NWPs, which address many of these concerns. Additionally, many of these factors will be evaluated during the project-specific evaluation.

One commenter noted that NWP 21 does not provide the public an opportunity to comment on the specific conditions of a permit that will affect their communities and watersheds.

Section 404(e) of the Clean Water Act provides the statutory authority for the issuance of general permits on a nationwide basis for any category of activities. The Corps establishes NWPs in accordance with section 404(e), by publishing and requesting comments on the proposed permits. The general public has the opportunity to comment on NWPs at this time. In order to address the requirements of the National Environmental Policy Act, the Corps prepares a decision document for each

NWP along with a 404(b)(1) Guidelines analysis. The decision document discusses the anticipated impacts on the Corps' public interest factors from a national perspective. NWPs are issued at the conclusion of this process. The individual projects that are proposed for authorization under an NWP are not given a permit but a verification or authorization that the project complies with an NWP. There are no requirements for public comments on specific projects authorized under NWPs. However, in the case of NWP 21, all projects must have undergone a separate SMCRA review process the provides for public notice and comment.

Several commenters recommended that NWP 21 be eliminated because it fails to require that the applicant demonstrate that there are no practicable alternatives to placing fill in waters of the United States, a requirement of Section 404(e) of the Clean Water Act. The commenters stated that the Corps wrongly assumes the SMCRA process to be comparable to Section 404 and the 404(b)(1) Guidelines. The commenters noted that, in fact, SMCRA does not require the applicant to choose the method of coal waste management that avoids and minimizes impacts and is least damaging to waters of the United States.

The Corps does not assume that other state or Federal agencies conduct a review that is comparable to the section 404(b)(1) Guidelines. Although analysis of offsite alternatives is not required in conjunction with general permits, each proposed project is evaluated for onsite avoidance and minimization, in accordance with general condition 20, and is not authorized under the NWP if the adverse impacts to waters of the United States are more than minimal.

Five commenters noted that coal slurry impoundments should not be allowed by an NWP and that NWPs can only be issued for activities that are similar in nature and that valley fills and coal slurry impoundments are not similar in nature.

The Corps has determined that slurry impoundments and valley fills are part of surface coal mining activities and are therefore similar in nature. The ''similar in nature'' requirement does not mean that activities authorized by an NWP must be identical to each other. We believe the ''categories of activities that are similar in nature'' requirement of Section 404(e) is to be interpreted broadly, for practical implementation of the NWP program.

The NWP is reissued as proposed.

NWP 22. *Removal of Vessels.* We proposed to rearrange the text of this NWP so that it is in a format similar to the other NWPs. In addition, we proposed to require pre-construction notification if the activity requires discharges of dredged or fill material into special aquatic sites.

One commenter asked if the pre-construction notification requirement included marine protected areas. One commenter said that pre-construction notification should be required for all vessel removals because certain removal methodologies may result in additional environmental impacts. One commenter stated that pre-construction notification should be required for all vessel removals from special aquatic sites, not just those involving discharges of dredged or fill material.

Pre-construction notification is required for NWP 22 activities in designated critical resources waters and their adjacent wetlands (see general condition 19), which may include marine protected areas. Designated critical resource waters include NOAA-designated marine sanctuaries, Natural Estuarine Research Reserves, and other waters identified by the district engineer after the issuance of a public notice and an opportunity for public comment. We do not agree that pre-construction notification should be required for all activities authorized by this NWP. However, we are modifying this NWP to require pre-construction notification for activities in special aquatic sites, to ensure that those activities result in minimal adverse effects on the aquatic environment. Vessel removal activities in special aquatic sites, especially coral reefs and vegetated shallows, have the potential to result in more than minimal adverse effects, even though there may be no discharge of dredged or fill material. Vessel removal activities in other areas conducted in compliance with the NWP and the general conditions will normally have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Further, division and district engineers will condition these activities as necessary to ensure that they will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively.

Another commenter observed that vehicles are often found in waters of the United States due to accidents, abandonment, and other reasons, and that the removal of the vehicles is necessary to minimize the adverse environmental impacts associated with release of automotive fluids. The commenter requested that this NWP be modified to allow for the expedited removal of vehicles from waters of the United States.

We agree that the presence of vehicles, and the associated automotive fluids, in waters of the United States can be environmentally damaging, and this NWP can be used to authorize their removal when they constitute an obstruction to navigation. However, we believe that the pre-construction notification requirements for activities into special aquatic sites are necessary to ensure that the activities authorized by this NWP have no more than minimal adverse effects. Division and district engineers can evaluate projects on a case by basis in situations where pollutants may be leaking from vehicles and determine if expedited or emergency processing procedures are warranted.

A commenter requested that the Corps indicate when EPA and Corps permits are required or provide citations to EPA and Corps regulations. One commenter noted that the parenthetical identification of statutory authorities was not included at the end of the text for this NWP.

The ''Note'' to this NWP already includes a citation of applicable EPA regulations. We do not believe it is necessary to add citations to the Corps regulations for implementing Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. We are correcting this NWP to identify the statutory authorities under which this NWP is issued (i.e., sections 10 and 404).

Another commenter requested that the Corps clarify in the preamble to the final rule that this NWP also applies to the removal of objects and structures such as derelict mooring and breasting structures, piles, docks, bridges and trestles that are man made obstructions to navigation. They remarked that some districts apply this NWP only to the removal of vessels. One commenter requested clarification as to when a pre-construction notification is required with respect to general condition 18, Historic Properties. They asked if the permittee would have to wait to remove the vessel until after the district engineer has informed the permittee that compliance with general condition 18 is complete.

The text of the NWP clearly states that the NWP applies to the removal of man-made obstructions to navigation, which may include any of the obstructions identified by the commenter in addition to wrecked, abandoned, or disabled vessels. If the vessel is listed, or eligible for listing, in the National Register of Historic Places, then consultation under Section 106 of the National Historic

Preservation Act is required. The permittee would have to wait until the section 106 process has been completed before conducting the work.

The NWP is reissued with the modification discussed above.

NWP 23. *Approved Categorical Exclusions.* We proposed to modify this NWP by reorganizing the text, adding language to explain that Corps' Regulatory Guidance Letters (RGLs) list the approved Categorical Exclusion (CE) activities, and adding language that directs prospective permittees to the appropriate RGLs to determine if pre-construction notification is required.

One commenter supported the proposed rewording of NWP 23, and supported the clarification of pre-construction notification requirements. One commenter remarked that this NWP violates the intent of the National Environmental Policy Act (NEPA) by enabling developers to avoid addressing ecological impacts.

The process for approving categorical exclusions for use with this NWP, including any approved categorical exclusions that require pre-construction notification, helps ensure that this NWP authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment and the public interest. In addition, only the actions of government agencies qualify for this NWP.

Another commenter suggested requiring pre-construction notification for activities adversely affecting more than 1/10 acre of wetland, and recommended adding a 1/3-acre limit to this NWP for wetland impacts. One commenter suggested that larger activities should be evaluated under individual permit procedures instead of using this NWP, and suggested that large highway projects impacting wetlands should not be authorized without the public involvement and the environmental safeguards of the 404(b)(1) Guidelines. One commenter suggested that all projects requiring stream channelization and any bridges spanning less than 1.5 times the bankfull width of a stream should be evaluated through the individual permit process.

The pre-construction notification thresholds established for the categorical exclusions approved for use with this NWP require case-by-case review for activities that have the potential to result in more than minimal adverse effects on the aquatic environment. For the same reasons, it is not necessary to impose an acreage limit on this NWP or require individual permits for large highway projects that impact small amounts of waters of the United States and qualify for approved categorical exclusions. In response to a pre-construction notification, the district engineer can add special conditions to the NWP authorization to ensure that adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work.

Two commenters said that this NWP authorizes activities that are not similar in nature. One commenter suggested that categorizing impacts by the effects instead of by the nature of activity is invalid, and that there appeared to be no limiting principle on the nature of the activities that could be permitted.

Regulatory Guidance Letter 05–07 lists all categorical exclusions currently approved for use with this NWP as of the date of this notice. This RGL is available on the Internet at: *http://www.usace.army.mil/cw/cecwo/reg/rgls/rgl_05_07_v2.pdf*. The lists of approved categorical exclusion activities referenced in RGL 05–07 represents impacts that are minor in nature, both individually and collectively. A limiting principle on the nature of activities exists because each government agency has inherent and mission-specific responsibilities and projects, and activities proposed by a specific agency within an approved categorical exclusion are similar in nature. The primary Federal action agency determines that the activities are categorically excluded from further environmental review. We believe that normally these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. However, division and district engineers can condition such activities where necessary to ensure there will be no more than minimal adverse effects on the aquatic environment, or exercise discretionary authority to require an individual permit for the work.

Two commenters asserted that the NWP fails to comply with a statutory requirement that the activities have minimal impacts individually and cumulatively. One of these commenters said that the Corps' estimate of 1,020 acres of impact to waters of the United States represents a significant impact.

We disagree with this assertion. Pre-construction notification is required for certain approved categorical exclusions that apply to activities that have the potential to result in more than minimal individual and cumulative adverse effects on the aquatic environment. In general, impacts authorized by this NWP are not significant because they are individually minor, are widely distributed across a vast area, and are scattered across many watersheds. In addition, compensatory mitigation offsets the authorized losses, and helps ensure that the authorized activities result in minimal adverse effects on the aquatic environment.

One commenter objected to the lack of specificity regarding the method of solicitation of public comments if new categorically excluded activities are proposed.

When proposing to add categorical exclusions for use with this NWP, Corps Headquarters publishes a proposal in the ''Notices'' section of the **Federal Register**. Public comment will be solicited through this notice, and all comments received will be thoroughly considered when the Corps makes its determination regarding those proposed categorical exclusions.

One commenter asked that the ''Note'' at the end of this NWP be expanded to list all of the agencies or departments that have categorical exclusions approved for use under this NWP. One commenter believed that referencing RGLs in the NWP is not sufficient, and suggested that the list of approved activities and pre-construction notification requirements be wholly included within the text of the permit rather than referenced to a separate document. Another commenter stated that the pre-construction notification requirements are vague, and recommended stating the pre-construction notification requirements within the text of the NWP or listing the specific RGL to refer to for those pre-construction notification requirements.

We have modified the ''Note'' by adding a sentence listing the agencies with approved categorical exclusions. Listing the approved activities and pre-construction notification requirements in the text of the permit is impractical, because of the lengths of those lists. In addition, simply referencing the list of RGLs is more useful because additional RGLs may be issued if more categorical exclusions are approved for use with this NWP.

One commenter asked that the text of this NWP be amended to acknowledge that state transportation agencies can legally assume the responsibility for categorical exclusion determinations for the Federal Highway Administration (FHWA).

The current text of the NWP states that activities ''undertaken, assisted, authorized, regulated, funded, or financed'' in whole or in part by a Federal agency are eligible to be considered by the Corps for possible approval as a categorical exclusion. We

believe that the current text is sufficient and there is no need to restate or affirm the relationships between the FHWA and the state transportation agencies, which generally fall into one or more of these categories.

This NWP is reissued as proposed.

NWP 24. *Indian Tribe or State Administered Section 404 Programs*. We proposed to add Indian tribes to this NWP, since they can be approved by EPA to administer the section 404 program. No comments were received.

This NWP is reissued as proposed.

NWP 25. *Structural Discharges*. No changes to this NWP were proposed. One commenter stated that it is difficult to perform these types of activities without some minor related temporary construction activity. They suggest adding a statement that allows minor construction activities.

The construction of these structural members is usually accomplished by installing sheeting or pilings to construct forms, which are then filled with concrete, sand, rock, or other materials. The installation of the sheeting or pilings usually does not result in a discharge of fill material that would require section 404 authorization. However, in cases where temporary construction, access, and dewatering activities are necessary to complete the activities authorized by this NWP, those temporary activities may be authorized by NWP 33, a regional general permit, or an individual permit.

The NWP is reissued as proposed.

NWP 27. *Aquatic Habitat Restoration, Establishment, and Enhancement Activities*. We proposed to modify this NWP by requiring reporting to the district engineer for those activities that do not require pre-construction notification. We also proposed to add shellfish seeding to the list of examples of activities authorized by this NWP, and remove the restriction limiting the use of this NWP only to those mitigation banks that have been approved in accordance with the 1995 mitigation banking guidelines. In addition, we proposed to prohibit the use of the NWP to authorize the conversion of natural wetlands.

We have modified the first paragraph of this NWP to more clearly present the general categories of authorized activities.

One commenter supported the broadening of the title of this NWP to include all aquatic habitats. One commenter said that this NWP has the potential to authorize projects with significant adverse impacts. One commenter said that this NWP should be revoked, because it could result in losses of wetland function and habitat and other adverse impacts to the aquatic environment. One commenter stated that there should be an acreage limit on this NWP. Two commenters said that wetland impacts should be limited to 2 acres, and another commenter stated that stream impacts should be limited to 2,000 linear feet. Another commenter stated that the lack of an acreage limit on this NWP does not encourage applicants to minimize adverse impacts. This commenter suggested a ½ acre limit for wetland fills and a 300 linear foot limit for stream impacts.

This NWP authorizes aquatic habitat restoration, establishment, and enhancement activities, provided those activities result in net increases in aquatic resource functions and services. Its use will not cause significant adverse effects on the overall aquatic environment. We do not believe there should be an acreage limit on this NWP, because of the requirement for these projects to result in net increases in aquatic resource functions and services. Moreover, all activities authorized under this NWP will be reviewed in advance by the Corps, either through the pre-construction notification requirement, or through the reporting requirement for projects conducted under authorities of other Federal agencies.

One commenter recommended prohibiting establishment of open water areas in existing wetlands and streams, and prohibiting the relocation of all aquatic resources. One commenter recommended removing the references to waterfowl impoundments because those impoundments may be considered enhancements by some people. This commenter said the establishment of impoundments in streams or natural wetlands should not be allowed for any reason. One commenter requested clarification whether this NWP authorizes green-tree reservoirs. One commenter suggested allowing dam removal activities to be authorized by this NWP. One commenter said that this NWP should authorize stream establishment, in cases where impaired or degraded streams can be relocated to provide net benefits to the aquatic environment and the overall watershed.

We have modified the text of this NWP, by removing the reference to establishing an impoundment for wildlife habitat. This NWP does not authorize green-tree reservoirs, because those activities generally degrade natural wetlands and would not result in a net increase in aquatic resource functions and services. Discharges of dredged or fill material into waters of the United States for the continued operation of existing green-tree reservoirs may be authorized by NWP 30. New green-tree reservoirs may be authorized by individual permits or regional general permits. This NWP prohibits the conversion of streams or natural wetlands to other aquatic habitat types or uplands, except for the relocation of non-tidal waters on the project site. We have also simplified the language regarding the relocation of non-tidal waters, including non-tidal wetlands, on the project site. The requirement that such relocations provide net gains in aquatic resource functions and services has been retained. Dam removal activities can be authorized by this NWP, provided they meet the requirements for its use, including that there is a net increase in aquatic resource functions and services. We have modified the third paragraph of this NWP to state that this NWP can be used to authorize the relocation of non-tidal streams, provided there are net increases to aquatic resource functions and services.

One commenter stated that using this NWP to authorize the relocation of non-tidal waters, including non-tidal wetlands, on the project site as long as there are net gains in aquatic resource functions and services, appears to contradict the provision prohibiting the conversion of streams or natural wetlands to another aquatic use. This commenter indicated that there will be different interpretations of the relative value of certain aquatic resource functions and services. This commenter also said that temporal lags associated with replacing certain wetland types, such as forested wetlands, should be considered.

The relocation of non-tidal waters on a project site does not necessarily contradict the provision prohibiting the conversion of streams or natural wetlands to another aquatic habitat type, if comparable streams or wetlands are restored or established elsewhere on the project site. District engineers will determine compliance with these provisions on a case-by-case basis, in response to a pre-construction notification or a report. We recognize that relocating non-tidal waters may result in temporal losses of certain aquatic resource functions and services, while the relocated waters undergo ecosystem development. To comply with these provisions of this NWP, the net increases in aquatic resource functions and services does not need to occur immediately after the NWP 27 activity has been constructed. However, those net increases need to occur over time through ecosystem development processes as a result of a successful

aquatic habitat restoration, establishment, or enhancement activity.

Two commenters noted that conversion of streams or wetlands to other aquatic uses is prohibited but conversions of waters to uplands are not prohibited. Three commenters supported the proposed language prohibiting conversion of streams or natural wetlands to other aquatic uses. Another commenter supported the language prohibiting conversion of wetlands to other aquatic uses, but said that it may limit the usefulness of this NWP, as it will not be able to authorize large ecosystem restoration projects that involve conversions of wetlands to other aquatic types, even where there are net benefits for the aquatic environment.

We have modified this NWP to prohibit the conversion of streams or natural wetlands to uplands. This prohibition does not apply to projects involving the relocation of non-tidal waters on the project site, as long as those activities result in net increases in aquatic resource functions and services. Large ecosystem restoration projects that involve conversions of aquatic habitat to other aquatic uses are more appropriately authorized through either regional general permits or individual permits.

To prevent re-arrangement of wetlands within a single development tract, one commenter asked that this NWP prohibit the relocation of aquatic habitat types on parcels where a local planning document exists for the development. One commenter objected to prohibiting the conversion of natural wetlands to other aquatic uses on the grounds that NWPs are intended to allow any activities with minimal adverse effects. This commenter stated that some conversions enhance ecosystem functions.

This NWP can be used to authorize relocation of aquatic habitats on a project site, even those with development activities, provided there are net gains in aquatic resource functions and services. These activities can be beneficial in cases where the development activity could have indirect adverse effects on the functions of existing aquatic resources on the project site, and where relocating those aquatic resources would result in enhanced ecosystem functions. We have revised the text of this NWP to prohibit the conversion of natural wetlands to other uses, unless that conversion is part of relocating non-tidal waters on the project site. This NWP does not authorize stream channelization, which often involves extensive armoring and straightening of stream channels.

One commenter suggested allowing the use of NWP 27 for the restoration and enhancement of tidal streams and tidal open waters. Another commenter said that this NWP should authorize the relocation and/or conversion of any tidal waters, provided the proposed work would result in net increases in aquatic resource functions and services. One commenter stated that this NWP should not authorize the construction of impoundments or partial impoundments in tidal wetlands or estuarine waters.

This NWP does not authorize the restoration of tidal streams and tidal open waters, but may authorize the restoration of riparian areas next to such waters. The restoration of tidal streams and other tidal open waters that involve more than restoring riparian areas is more appropriately authorized by other Department of the Army permits, since those activities may result in more than minimal adverse effects on the aquatic environment. We do not believe it would be appropriate to modify this NWP to authorize those activities. We maintain our position that this NWP should not authorize the relocation or conversion of tidal waters. Those activities may be authorized by individual permits or regional general permits. This NWP does not authorize the conversion of tidal waters to other uses, such as impoundments or partial impoundments.

One commenter said that many activities proposed as restoration actually degrade habitat or result in a net loss of habitat, and stated that pre-construction notification should be required for all activities authorized by this NWP, to determine the beneficial effects and whether the activity is protective of tribal resources.

Pre-construction notification is required for activities authorized by this NWP, except for those activities conducted in accordance with binding agreements between certain Federal agencies or their designated state cooperating agencies, voluntary wetland activities documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards, or the reclamation of surface coal mining lands, in accordance with permits issued by the Office of Surface Mining or the applicable state agency. For those activities that do not require pre-construction notification, reporting to the district engineer is required. In the latter cases, the district engineer can review the documentation provided through reporting to ensure that the activity qualifies for NWP authorization. The reporting requirements provide district engineers with the opportunity to review aquatic habitat restoration, establishment, and enhancement activities conducted under the purview of other government entities, to ensure that those activities result in net increases in aquatic resource functions and services. The pre-construction notification requirements, as well as the reporting requirements, will help ensure that this NWP authorizes only activities that comply with the terms and conditions of this NWP, including general condition 16, Tribal Rights.

One commenter stated that the reporting requirement for voluntary NRCS-related wetland projects would be burdensome, and suggested that requiring NRCS documentation could discourage voluntary wetland restoration activities. Another commenter said that there appears to be little difference between the reporting and pre-construction notification provisions, and suggested requiring pre-construction notifications for all NWP 27 activities. Two commenters supported the requirement that copies of restoration agreements be submitted. One commenter recommended requiring pre-construction notifications and interagency coordination for all projects using NWP 27, to ensure that development activities are not conducted as NWP 27 activities. A commenter objected to requiring the submittal of restoration agreements to fulfill the reporting requirement, citing privacy concerns. This commenter said that alternative types of information could be submitted instead to report proposed NWP 27 activities conducted under these agreements. One commenter stated that the Corps and other agencies should be required to approve wetland enhancement, restoration, or establishment agreements referenced in the reversion provisions of NWP 27.

The pre-construction notification requirements are sufficient to ensure proper implementation of NWP 27. We have clarified the language in the NWP to reduce confusion. To avoid duplicative efforts by the government, pre-construction notification is not required for activities conducted under agreements or arrangements with other state or Federal government agencies. Pre-construction notification is required for all other activities. The reporting requirement will provide a mechanism whereby the Corps can review proposed activities conducted under other agency programs, to ensure that they comply with the terms and conditions of this NWP. We are modifying the reporting requirement to allow the submittal of project descriptions and plans, in lieu of

binding agreements executed between agencies and landowners.

It would be inappropriate to require Corps approval of wetland enhancement, restoration, or establishment agreements executed and administered by other agencies. For those activities that require pre-construction notification and will result in the loss of greater than ½ acre of waters of the United States, agency coordination is required (see paragraph (d) of general condition 27).

One commenter suggested modifying the reversion, reporting, and notification provisions by referencing actions documented by ''NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide Standards'' instead of ''NRCS regulations,'' since many of these wetland restoration, enhancement, and establishment activities are performed by technical service providers, who must be certified by NRCS and comply with the Field Office Technical Guide standards. We concur with this recommendation, and have made appropriate changes to the text of this NWP.

One commenter said that replacing the word ''values'' with ''services'' demeans the functions provided by a healthy ecosystem, unless the term ''functions'' is specifically retained. Another commenter remarked that replacing the word ''values'' with ''services'' is inconsistent with the common industry vernacular. They suggest using the word ''functions'' instead of ''services.''

We are retaining the term ''functions'' in the text of this NWP, and are replacing the word ''values'' with ''services'' because ecosystem services provide a more objective measure of the importance of aquatic resource functions to human populations. The terms ''functions'' and ''services'' are not equivalent, and therefore it would not be appropriate to replace the term ''services'' with ''functions.'' Services are the benefits that humans derive from the functions performed by wetlands and other aquatic resources. The term ''services'' is now being used in place of ''values'' in the ecological economics literature, because of the difficulty in assigning value to ecosystem services. As discussed in the September 26, 2006, **Federal Register** notice, values may relate to either monetary or non-monetary measures, but services can be described in physical terms that are easier to evaluate and address, where necessary, in NWP authorization letters and special permit conditions.

Two commenters supported allowing the use of NWP 27 to authorize the construction of mitigation banks. One commenter requested clarification that this NWP could be used for wetland mitigation banks, and one commenter asked that the NWP apply to all mitigation banking projects, not just those with a signed mitigation banking agreement. Two commenters said that the construction of mitigation banks should not be authorized by NWP 27, but should be authorized by individual permits instead. One commenter stated that it would be acceptable to allow the use of NWP 27 for mitigation bank construction with a caveat that impacts associated with mitigation bank construction be deducted from any available credit the mitigation bank develops. One commenter requested that this NWP contain language stating that compensatory mitigation is required for activities authorized by NWP 27, but another commenter suggested that no compensatory mitigation should be required for impacts associated with construction of compensatory mitigation projects.

This NWP can be used to authorize aquatic resource restoration, establishment, and enhancement activities necessary for the construction of mitigation banks. It is not necessary for the mitigation bank proponent to obtain a signed mitigation banking instrument prior to conducting the NWP 27 activity, but the mitigation bank proponent needs to understand that activities conducted prior to approval of a banking instrument may or may not be approved in any final instrument. The Corps thus recommends that construction of mitigation banks not begin until a final instrument has been signed. Requiring compensatory mitigation for losses of waters of the United States as a result of NWP 27 is at the discretion of the district engineer. The crediting of a mitigation bank will be determined by the district engineer during the approval process for the mitigation banking instrument. Any adverse impacts to aquatic resources resulting from construction of the bank would certainly be considered in that determination.

Two commenters said that this NWP should require permittees to plant native species at the site. They said that the proposed language contains too much flexibility. One commenter said that NWP 27 should not authorize activities in waters inhabited by anadromous fish. One commenter stated that the U.S. Fish and Wildlife Service must concur with projects in which machinery must work in waters where endangered or threatened species are present. One commenter indicated that this NWP should authorize work in flowing waters where the activity will result in long-term stability and habitat benefits.

It would be inappropriate to require permittees to plant only native species at the project site. Native plant materials may not be available for all of these projects, and it is difficult to define precisely what constitutes a ''native'' species. The activities authorized by this NWP are required to result in net increases in aquatic resource functions and services, which should benefit anadromous fish species. However, district engineers will review pre-construction notifications and other reported activities to determine if the proposed aquatic habitat restoration, establishment, or enhancement activity would have more than minimal adverse effects on anadromous fish species, or require consultation under Section 7 of the Endangered Species Act. In addition, division and district engineers can develop regional conditions or case-specific conditions to ensure that potential impacts to anadromous fish are minimal, or exercise discretionary authority to require an individual permit for the work if impacts are expected to be more than minimal. Compliance with the other general conditions for the NWPs, including general condition 9, Management of Water Flows, is required, though general condition 9 specifically allows activities that alter the pre-construction course, condition, capacity, and location of open waters if they benefit the aquatic environment.

One commenter requested clarification of what constitutes a ''small'' nesting island, and requested that the NWP state that approved water quality standards cannot be violated during construction of small nesting islands. Another commenter said that pre-construction notification should be required for the construction of small nesting islands in special aquatic sites. One commenter asked for a definition of the term ''enhancement activities.'' One commenter suggested requiring monitoring of stream restoration projects, with mandatory corrective actions for projects that are not successful.

The district engineer has the discretion to determine what a ''small nesting island'' is for the purposes of this NWP. Either pre-construction notification or reporting is required for all activities authorized by this NWP, which will provide district engineers with opportunities to review all proposed activities, including the construction of small nesting islands, to determine those activities comply with the terms and conditions of the NWP.

The term ''enhancement'' is defined in the ''Definitions'' section of the NWPs. District engineers have the authority to require additional monitoring or corrective measures on a case-specific basis. We believe it is unnecessary to restate those authorities in the text of this NWP.

One commenter said that this NWP should prohibit the widening or straightening of stream channels, the removal of gravel bars, the destruction of woody vegetation, and the in-stream use of bulldozing or heavy equipment. Another commenter stated that NWP 27 should require the use of natural stream channel design for in-stream work. Two commenters suggested that this NWP should not authorize the use of riprap or other armoring. One commenter suggested limiting the use of this NWP to restoration of a stream to its historic non-degraded condition to prevent the use of this NWP for construction of flood control projects.

This NWP does not authorize stream channelization activities. It may be necessary to temporarily impact gravel bars or vegetation during the construction of stream restoration and enhancement activities. After the construction of the stream restoration or enhancement project, the stream channel should move water and sediment in a manner that will result in a channel morphology that provides habitat for a diverse community of species. That restored or enhanced habitat will include gravel bars, if the bed load carried by the stream includes a sufficient proportion of gravel. In addition riparian vegetation will normally be planted or allowed to grow back to replace the impacted riparian vegetation after construction activities have been completed. In-stream use of heavy equipment is not prohibited, because such equipment is usually necessary to conduct stream restoration and enhancement activities. In response to a pre-construction notification, or the review of the other Federal agency agreement, the district engineer will determine whether the proposed activity complies with the terms and conditions of the NWP, including the requirement for the activity to result in net increases in aquatic resource functions and services. It would be inappropriate to require, in the text of this NWP, specific design or construction methods, or prohibit the use of riprap or other armoring. Armoring using riprap or other materials can be a necessary component of beneficial aquatic habitat restoration, establishment, and enhancement projects.

We believe that limiting the use of this NWP for the sole purpose of restoring streams to historic conditions would be overly restrictive, and would effectively prohibit its use for other beneficial restoration activities. Further, the pre-construction notification and reporting requirements for this NWP will help ensure that activities conducted under this NWP comply with the purposes and intent of the NWP, as well as its terms and condition.

Two commenters said that the prohibition against stream channelization conflicts with general condition 9, Management of Water Flows, which allows stream restoration and relocation for some NWP activities. One commenter suggested that the Corps remove the channelization restriction from NWP 27 and expand the definition of ''stream channelization'' to authorize activities beneficial to the aquatic environment.

As noted above, general condition 9 allows the use of any NWP for projects that alter the pre-construction course, condition, capacity, and location of open waters if they benefit the aquatic environment. The removal of the stream channelization prohibition from NWP 27 could inadvertently allow projects to proceed under this NWP that have more than minimal adverse impacts on the aquatic environment. We also believe that it is unnecessary to modify the definition of stream channelization as suggested because the definition provides an accurate and concise description of what constitutes stream channelization.

One commenter recommended limiting the use of NWP 27 to projects conducted by or sponsored by state or federal agencies. One commenter recommended removing the reference to prior converted croplands.

We disagree that use of this NWP should be limited to activities conducted or sponsored by state or federal agencies, however, projects not conducted pursuant to authorities of other agencies do require a pre-construction notification. The reference to prior converted croplands in the reversion provision is necessary, since prior converted croplands are not considered to be waters of the United States (see 33 CFR 328.3(a)(8)).

One commenter suggested including a definition for shellfish seeding in the NWP. One commenter questioned whether the Corps has regulatory jurisdiction over shellfish aquaculture and restoration activities. Another commenter requested clarification whether pre-construction notification is required for shellfish seeding authorized by this NWP. One commenter recommended removing the pre-construction notification requirement for shellfish activities that have the approval of other government agencies with resource management responsibilities. Two commenters said that state natural resource agencies should be exempted from the pre-construction notification requirements if the shellfish seeding activity is done over an unvegetated bottom, since those activities are already addressed by other state and Federal permit processes. Two other commenters expressed concern that the proposed changes to the NWP would adversely affect community-based shellfish restoration efforts, including locally-based oyster restoration programs. They said that the pre-construction notification requirements, or requiring any permit for shellfish restoration, would be overly burdensome and would adversely affect community-based programs that are already operating with volunteer staffs, minimal budgets, and limited resources.

We are providing a definition of ''shellfish seeding'' in the ''Definitions'' section of the NWPs. This definition was derived from the definition provided in the preamble discussion for proposed NWP D, Commercial Shellfish Aquaculture Activities (see 71 FR 56275). Shellfish aquaculture and restoration activities require Department of the Army authorization, if they involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States. On-going commercial shellfish aquaculture activities may be authorized by NWP 48 and shellfish restoration activities may be authorized by NWP 27. New commercial shellfish aquiculture activities may be authorized by regional general permits or individual permits. The pre-construction notification requirement is necessary for shellfish habitat restoration activities, except those conducted under one of the other listed authorities, to ensure that those projects comply with the terms and conditions of this NWP and do not cause more than minimal adverse effects. However, the Corps does not believe that the PCN requirement is overly burdensome and it should not limit the ability of community-based programs to conduct such activities.

One commenter opposed modifying this NWP to authorize shellfish restoration activities because they believe that these projects can have more than minimal impact on benthic habitat. One commenter said that shellfish seeding should not be authorized by this NWP. Another

commenter suggested that fill placement for shellfish seeding or shellfish bed preparation activities should not qualify for any NWP and should only be evaluated under individual permit processes. Several commenters recommended that shellfish seeding should be authorized by this NWP. A number of commenters stated that shellfish seeding can be used to protect or restore valuable aquatic habitats since construction of oyster reefs has been used to attenuate wave energy as part of coastal restoration strategies.

The restoration of oyster habitat, as well as the habitat of other shellfish species, usually provides substantial benefits to the overall aquatic environment. Shellfish help improve water quality and other habitat characteristics of estuarine and marine waters. Shellfish seeding is often a necessary component of restoration activities, when the objective is to increase populations of shellfish. District engineers will review pre-construction notifications or agreements with other agencies to ensure that these activities result in minimal individual and cumulative effects on the aquatic environment and other public interest factors. In response to a pre-construction notification, the district engineer can add special conditions to the NWP authorization or exercise discretionary authority and require an individual permit.

One commenter remarked that shellfish seeding practices could be considered an aquaculture activity, and said that the requirements of NWP 27 could be a significant barrier to aquaculture development. Another commenter indicated that projects solely associated with shellfish restoration could be authorized by NWP 27, but suggested that it would be more appropriate to authorize such activities under the proposed NWP for commercial shellfish aquaculture activities. One commenter expressed concern that NWP 27 may overlap with NWP 48. One commenter stated that some oyster restoration and enhancement is done by commercial shellfishing operations that harvest only wild oysters. In some cases, shellfish husbandry or restoration is required by other regulatory agencies, and the commenter stated that neither NWP 27 nor NWP 48 allow this activity. One commenter asked if each oyster bed restoration would require a separate permit, or could an entity apply for a single permit to cover all of their shellfish restoration projects. They recommended establishing a single permit that any state natural resource agency could use at any time to eliminate the need for those agencies to obtain separate permits for numerous individual projects.

This NWP does not authorize commercial aquaculture activities. It authorizes shellfish habitat restoration activities, including shellfish seeding, that are conducted to restore populations of shellfish in navigable waters of the United States. Although these restored shellfish populations may be harvested at a later time by licensed fisherman, the objective of the activities authorized by this NWP must be to restore populations of shellfish in navigable waters of the United States. This NWP does not authorize structures or work, such as nets and anchors, that are used to reduce or eliminate predation of shellfish growing in these restored habitats. On-going commercial aquaculture activities may be authorized by NWP 48, regional general permits, or individual permits. New commercial aquaculture activities may be authorized by regional general permits or individual permits. This NWP authorizes single and complete shellfish habitat restoration activities. Regional general permits or individual permits may be issued by district engineers to authorize shellfish restoration programs.

This NWP is reissued, with the modifications discussed above.

NWP 28. *Modifications of Existing Marinas.* No changes were proposed for this NWP. One commenter said that modifications in special aquatic sites, such as vegetated shallows or coral reefs, should require pre-construction notification. This commenter also requested clarification whether this NWP authorizes pile driving, and recommended requiring pre-construction notification for such activities.

This NWP authorizes the installation of piles for the reconfiguration of marinas. The reconfiguration of existing marinas generally results in minimal individual and cumulative adverse effects, since these activities are limited to areas currently used for marinas. Therefore, it is unnecessary to require pre-construction notification for these activities. However, division engineers can regionally condition this NWP to require pre-construction notification for activities in certain areas.

This NWP is reissued as proposed.

NWP 29. *Residential Developments.* We proposed to modify this NWP by incorporating the residential development provisions of NWP 39, so that there would be one NWP to authorize single unit and multiple unit residential developments, including residential subdivisions. We also proposed to reduce the scope of applicable waters for this NWP, by prohibiting its use to authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters. In addition, we proposed to require pre-construction notification for all activities.

One commenter requested that a definition of ''residential property'' be provided. This commenter also said that this NWP should include a provision prohibiting its use with NWP 39 to authorize mixed use developments. Two commenters objected to including multiple-unit residential developments in NWP 29 because they felt it is inconsistent with the original intent of NWP 29. Several commenters stated that including multiple-unit residential development would lead to problems with water quality certifications or local government decisions. Two commenters said that single-family and multi-unit developments are not similar in nature while another questioned the need and the rational for the proposed change.

This NWP utilizes the commonly accepted definition of what constitutes a residential property. We do not agree that there should be a prohibition against combining NWPs 29 and 39 to authorize mixed use developments, because the terms and conditions of those NWPs, including the pre-construction notification requirements and general condition 24, Use of Multiple Nationwide Permits, will help ensure that those activities will result in minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors. As discussed in the preamble of the September 26, 2006, **Federal Register** notice, the proposed changes effectively eliminate the previous NWP 29. Previously, single family residential projects could choose between NWPs 29 and 39. NWP 39 had a higher acreage limit, but NWP 29 could allowed activities in wetlands adjacent to tidal waters. We have determined that that all residential projects using an NWP, whether single-family or multi-family, should face the same set of requirements. In particular, we have determined that residential projects in wetlands adjacent to tidal waters should not be authorized through an NWP, so we are combining all residential development activities in NWP 29 and eliminating its use in wetlands adjacent to tidal waters. We believe the ½ acre limit previously included in NWP 39 will ensure that projects undertaken only in non-tidal waters and their adjacent wetlands will not have more than minimal adverse effects. Limits for multi-family residential projects have not changed,

these activities have merely been shifted into NWP 29. States concerned with multiple unit residential developments may add stipulations to their water quality certifications that differentiate between single-family and multi-unit developments. Local governments can address their concerns over residential development through their planning and zoning processes. Also, the Corps is expanding the pre-construction notification requirement to include all projects authorized under this NWP, to enhance our ability to identify projects that may have more than minimal adverse effects.

One commenter suggested we add ''single-unit residential subdivision'' to the list of authorized activates in the first sentence.

We have added the phrase ''residential subdivision'' to the list of activities authorized by this NWP. This NWP authorizes residential subdivisions with multiple single-family units or multiple-family units.

Several commenters objected to raising the acreage limit from ¼ acre to ½ acre. One commenter said that the ½ acre limit will result in substantial cumulative losses of waters of the United States. Two comments recommended acreage limits of one or two acres. One commenter asked why the ½ acre limit is not for associated multi-unit developments when it is expressed as the limit for single-family residences.

As noted above, the effective acreage limit for residential projects has not been raised. We have simply removed the option of using an NWP with a ¼ acre threshold to authorize single-family projects in wetlands adjacent to tidal waters. Through the review of pre-construction notifications, district engineers will monitor the use of this NWP so that more than minimal cumulative adverse effects do not occur. We disagree that increasing the acreage limit to one to two acres would result in activities that have minimal impacts on the aquatic environment. The ½ acre limit applies to any type of residential subdivision (single-family, multi-family, or a combination of both), as it did previously when these projects were authorized by NWP 39.

Some commenters objected to requiring pre-construction notification for all activities, and suggested changing the pre-construction notification threshold to 1/10 acre. Three commenters proposed a 1/10 acre pre-construction notification threshold for single-family developments. Three commenters supported the proposed pre-construction notification threshold. One commenter suggested establishing a graduated pre-construction notification threshold based on the size of the overall development.

We are retaining the requirement for pre-construction notification for all activities authorized by this NWP. Although this will result in an increase in the number of pre-construction notifications submitted to district engineers, we do not believe that it will be a substantial increase, since many permittees proposing to construct residential developments in the past have submitted verification requests for NWP 39 authorization even when not required to do so. The NWP 29 issued in 2002 require pre-construction notification for all proposed single family homes. The pre-construction notification threshold will also help ensure compliance with general condition 17, Endangered Species, and general condition 18, Historic Properties. A graduated pre-construction notification requirement would be unnecessarily complex and would not provide as much assurance that only activities with no more than minimal adverse effects are authorized.

Many commenters discussed the 300 linear foot limit for stream bed impacts. Those comments are discussed in a separate section of the preamble. We are retaining the 300 linear foot limit for stream bed impacts, as well as the ability for district engineers to provide written waivers of the 300 linear foot limit for losses of intermittent and ephemeral stream beds.

Several commenters said that this NWP should retain the requirement to maintain sufficient buffers adjacent to all open water bodies, such as streams. Some commenters stated that a minimum buffer width should be required. One commenter supported the removal of the buffer requirement and addressing the need for riparian areas through general condition 20, Mitigation.

The establishment and maintenance of riparian areas next to streams and other open waters will be required by district engineers as compensatory mitigation where necessary to ensure that the authorized work results in minimal individual and cumulative adverse effects on the aquatic environment. Although the NWP 29 issued in 2002 contained a requirement to establish sufficient vegetated buffers, the counterpart language in the 2002 NWP 39 reflected the use of vegetated buffers as components of the compensatory mitigation plan for the NWP 39 activity, if there were streams or other open waters on the project site. District engineers will make determinations regarding the appropriateness and practicability of requiring riparian areas, as well as their width, in the implementation of general condition 20, Mitigation.

Three commenters said that residential developments are not water dependent activities, and therefore, under the Section 404(b)(1) Guidelines, an NWP should not be issued unless all practicable alternatives have been considered. Some commenters objected to authorizing attendant features by NWP 29, because they may not be water dependent or there may be secondary impacts associated with the development.

An activity that is not water dependent may still be authorized by NWP as long as an appropriate Section 404(b)(1) Guidelines analysis is conducted when the NWP is issued. The decision documents for all NWPs, including this NWP, that authorize discharges under Section 404 of the Clean Water Act include a Section 404(b)(1) Guidelines analysis.

Two commenters objected to including septic fields as attendant features and three commenters objected to including sports fields and golf courses as attendant features. One commenter requested a definition of the term ''integral part'' to reduce the potential for authorizing golf courses that are not directly associated with the residential development. One commenter objected to the use of the NWP for large subdivisions, because of potential impacts due to sprawl, traffic, and degradation of water quality.

Septic fields are often necessary attendant features for residences, and should be authorized where part of a single and complete project. Sports fields and golf courses may also be integral attendant features of residential developments. District engineers will determine, in response to pre-construction notifications, whether golf courses are integral parts of the residential development. Impacts of large subdivisions will be considered during the pre-construction notification review process. If such projects would have more than minimal adverse effects, these will be addressed through project-specific special conditions or by requiring an individual permit.

One commenter requested that we define ''subdivision'' as an ''area that involves all residences that share the attendant features.'' One commenter urged that phased developments be prohibited since they can result in impacts to waters that otherwise can be avoided with comprehensive planning and permitting.

Defining the term ''subdivision'' is unnecessary as there is little confusion

surrounding the term. Phased developments can be authorized by the NWP, provided that each phase is a single and complete project and has independent utility. When reviewing pre-construction notifications, district engineers will take into account individual and cumulative impacts of phased developments. We strongly support comprehensive planning efforts undertaken by local governments as a means of reducing impacts to the aquatic environment. Where the cumulative effects of phased projects would be more than minimal, these will be addressed through project-specific special conditions or by requiring an individual permit.

Four commenters requested that the NWP authorize projects in non-tidal wetlands adjacent to tidal waters, while two comments supported the proposal to prohibit the use of the NWP in those areas. One commenter requested a definition of the term ''adjacent.'' Two commenters objected to removal of language concerning minimization of on-site and off-site impacts, such as avoiding flooding of adjacent lands.

Limiting the use of this NWP to non-tidal waters of the United States, and prohibiting its use in non-tidal wetlands adjacent to tidal waters is necessary to ensure that this NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. Development along coastal waters is a growing concern with significant potential to cause more than minimal adverse effects, particularly cumulatively. Such projects can be authorized by an individual permit following appropriate environmental review. The term ''adjacency'' is defined at 33 CFR 328.3(c). For the NWPs, including NWP 29, requirements to avoid and minimize impacts to waters of the United States are addressed through general condition 20, Mitigation.

District engineers will review pre-construction notifications to ensure that all practicable on-site avoidance and minimization has been accomplished. In response to a pre-construction notification, the district engineer may require compensatory mitigation to ensure that the authorized activity results in minimal adverse environmental effects (see 33 CFR 330.1(e)(3)).

One commenter said that NWP 29 should not be issued because it results in more than minimal adverse impacts particularly when salmonids are present. One commenter stated that this NWP should not authorize impoundments. One commenter said that there should be an exemption for residential developments in coastal areas in the eastern United States.

Potential impacts to salmon species are more appropriately addressed through regional conditions. Division engineers may regionally condition this NWP to restrict or prohibit its use in waters inhabited by salmonids. Impoundments may be authorized as attendant features, after reviewing the pre-construction notification. Section 404 permits are required for discharges of dredged or fill material into waters of the United States to construct residential developments. Such activities do not qualify for exemptions under Section 404(f)(1) of the Clean Water Act.

This NWP is reissued with the modifications discussed above.

NWP 30. *Moist Soil Management for Wildlife.* We proposed to modify this NWP to allow any landowner to use this NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States for the purpose of managing wildlife habitat and feeding areas.

Some commenters supported the proposed changes to this NWP, since it will facilitate the production of large amounts of wetland/wildlife habitat and conserve the Nation's native wildlife populations. However, other commenters expressed concern about the use of this NWP by private landowners, because they may be creating impoundments to increase wildlife habitat. One commenter recommended requiring interagency coordination to provide guidance to landowners and to help ensure land cover types are not detrimentally converted to other land cover types. One commenter said that expanding the NWP to apply to all landowners would result in more than minimal cumulative adverse effects.

We believe that it is appropriate to expand the use of this NWP to private landowners that have an interest in attracting and supporting various species of wildlife on their land. This NWP does not authorize the construction of impoundments, because it does not authorize new roads, dikes, and water control structures. We believe that it is not necessary to require interagency coordination for these activities because only activities that do not result in a net loss of aquatic resource functions and services are authorized. The terms and conditions and the ability of division engineers to impose regional and case-specific conditions on this NWP, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse effects on the aquatic environment.

One commenter recommended imposing a ½ acre limit on activities conducted by private landowners. One commenter recommended adding pre-construction notification requirements to this NWP, so that district engineers can review proposed activities to ensure that they comply with the terms and conditions of the NWP. One commenter indicated that this NWP should authorize moist soil management activities for native vegetation that are not necessarily for wildlife use.

Since this NWP authorizes only on-going wildlife management activities involving moist soil management, we do not believe it is necessary to impose an acreage limit or require pre-construction notification for these activities. Division engineers can regionally condition this NWP to require pre-construction notification, if there are concerns for the aquatic environment or other public interest review factors that may need to be addressed through case-specific review of these activities. Moist soil management activities conducted primarily for growing native plants may be authorized by other NWPs, regional general permits, or individual permits. Restoration of wetland meadows, forested wetlands, and other native plant communities may also be authorized by NWP 27.

One commenter suggested changing the title of this NWP to ''Maintenance of Existing Moist Soil Management Areas for Wildlife.'' One commenter recommended modifying the ''Note'' at the end of this NWP to acknowledge that maintenance may be exempt under Section 404(f) of the Clean Water Act.

We do not agree that it is necessary to change the title of this NWP, because the text of the NWP clearly states that is authorizes only soil management for on-going, site-specific, wildlife management activities. We have modified the ''Note'' to include a statement concerning the section 404(f) exemption.

This NWP is reissued with the modification discussed above.

NWP 31. *Maintenance of Existing Flood Control Facilities.* We proposed to remove the last sentence of the first paragraph of this NWP. In addition, we proposed to add levees to the list of features that can be maintained through the authorization provided by this NWP.

A few commenters stated support for the addition of levees to the list of features that can be maintained with authorization under this NWP. In addition, one commenter recommended that the Corps exempt or develop a streamlined NWP for federally

constructed or funded levees where maintenance responsibilities for those levees have reverted to a local agency.

We believe that the NWP program is already a streamlined permit process and discharges associated with federally constructed and funded flood control projects which have reverted to a local agency should still be subject to the requirements of this NWP, including the establishment of a maintenance baseline. At this time, we believe it is necessary to conduct a site specific verification through the pre-construction notification process to ensure that the adverse effects of the project are no more than minimal. The Corps has no authority to exempt discharges of dredged or fill material that occur in conjunction with the maintenance of the facility, or to waive any requirement for necessary mitigation. The inclusion of levees in this NWP does not preclude maintenance of levees that is allowed under other NWP authorizations, such as NWP 3.

One commenter stated that, as flood control projects constructed by the Corps and transferred to a non-federal sponsor have a Corps-developed Operations and Maintenance (O&M) manual, and the sponsor is obligated to perform maintenance according to the O&M manual, the project's as-built drawings and O&M manual should constitute the maintenance baseline. Therefore, no maintenance baseline submittal should be required.

The intent of this NWP is to require the submittal of a maintenance baseline for all projects requesting authorization by this NWP. A non-federal sponsor can submit the as-built drawings and O&M manual from a federally-constructed or funded flood control project. In any case the maintenance baseline must be approved by the district engineer.

Another commenter suggested that the requirement to submit best management practices (BMPs) with the maintenance baseline documentation be eliminated, as BMPs are addressed by several general conditions. This commenter also requested that we clarify the important exception that applies to this NWP in regard to the general condition 27 requirement that the district engineer must approve any compensatory mitigation proposal before the permittee commences work. The Corps disagrees that the requirement to submit BMPs is adequately addressed by general conditions. We believe that inclusion of the BMPs in the documentation is necessary so that the Corps can ensure that the impacts associated with the activity will be no more than minimal. In addition, the inclusion of certain BMPs may reduce the impacts to the aquatic environment and, as a result, the required one-time mitigation associated with establishing the baseline. The BMPs submitted with the maintenance baseline documentation do not preclude the Corps from requiring additional BMPs that might be necessary to ensure that the maintenance activity results in minimal adverse effects on the aquatic environment. Regarding mitigation approval, we believe the proposed text of this NWP clearly states that for this NWP, the district engineer will not delay necessary maintenance so long as the district engineer and permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. It also states that work can begin before approval of the maintenance baseline in emergency situations.

Two commenters opposed adding levees to the list of features that can be maintained through authorization by this NWP. One of these commenters believed that the change constitutes more than a wording change, because levees are large scale structures with impacts that require a thorough assessment. The other commenter stated that levees disrupt natural processes important to floodplains and habitat. They also noted that the presence of levees on a stream does not transform the stream into a flood control facility.

While we agree that the construction of levees may require a thorough assessment of impacts on the watershed, the maintenance of existing levees is an activity that is appropriate for inclusion in this NWP since levees are often integral parts of flood control facilities. This NWP does not authorize the construction of levees. We believe that the limitations and general conditions associated with the NWP will ensure that authorized projects will have no more than minimal adverse effects. The requirement for an approved baseline and the ability to require mitigation provides a safeguard for valuable habitat. The Corps agrees that levees do not make a stream a flood control facility. However, levees are a flood control facility and this NWP should allow maintenance of the levees. In order for flood control activities to occur in the stream, they would have to be included in the maintenance baseline, as described in the text of the NWP.

One commenter observed that the text of this NWP uses the phrase ''significantly reduced capacity'' when discussing abandonment. They stated that Regulatory Guidance Letter 87–2 discusses the ramification of using the word ''significant'' in Corps documentation and suggested that it be changed. Another commenter said that this NWP should not authorize actions that need to be taken because of neglect.

We believe that the use of the word ''significantly'' in this NWP is not contrary to the Regulatory Guidance Letter because it describes a level of reduction in flood capacity and does not relate to any determination of environmental impacts. If a flood control facility can be considered abandoned because of neglect, then the NWP would not authorize the work needed to reconstruct that facility.

Another commenter requested that the fill associated with beaver dam control and maintenance be added to the list of features authorized by this NWP. While the Corps agrees that the maintenance of beaver dam control and maintenance structures may be authorized by this NWP, this NWP does not authorize fills associated with the construction of new structures.

Two commenters opposed removing the last sentence in the first paragraph of this NWP (regarding types of maintenance activities that do not require section 404 permits) because they believe that the language clarified that vegetation maintenance does not require a section 404 permit. The Corps believes that this sentence is unnecessary, since Section 404 permits are only required for discharges of dredged or fill material, and, per the regulations at 33 CFR 323.2(d)(3)(ii), vegetation removal above the ground, that does not disturb the root system or include redeposition of excavated soil material, is not a discharge of dredged or fill material.

One commenter stated that many existing flood control facilities may not have met the criterion (i.e., it was previously permitted by the Corps, it did not require a permit at the time it was constructed, or it was constructed by the Corps and transferred to a non-federal sponsor), or the permittee cannot provide documentation that the criterion was met. Another commenter requested that this NWP authorize the maintenance of projects that were built by others but accepted as part of a federal flood control project or those that are authorized under state or local flood control laws. Both commenters requested that the Corps modify or eliminate the criterion listed in the first sentence of this paragraph and authorize maintenance of any flood control facility after approving the maintenance baseline and reviewing the activity through the pre-construction notification process. In addition, one commenter stated that the Corps should

not consider a flood control facility to be abandoned because vegetation has become established in the facility. That commenter also said that the NWP should compel agencies to perform maintenance more frequently by requiring mitigation for temporal losses in vegetation or habitat. Another commenter stated that agencies should be encouraged to reduce the frequency of maintenance where feasible by approving maintenance baselines that allow for less frequent maintenance. One commenter said that this NWP should also authorize temporary stockpiling as authorized by NWP 12.

The criteria in the first sentence of this NWP cover all properly authorized flood control facilities. Unless a flood control facility was constructed as a result of a Corps Civil Works project, it would have required a Corps permit unless it was constructed in a manner that did not require Corps authorization or it was exempt from permit requirements. If it should have had Corps authorization but did not, we do not think it is appropriate to authorize maintenance under this NWP. The Corps will not generally require documentation of compliance with these criteria, unless there is reason to believe that these criteria are not met.

We believe that the current text accurately describes how a site should be determined to be abandoned. The presence of vegetation does not necessarily indicate that a flood control facility has been abandoned. However, a site may be determined to be abandoned when vegetation has substantially diminished the capacity of the channel. We do not believe it is necessary to require permittees to conduct maintenance more frequently, to prevent the establishment of vegetation within the flood control facility. The one-time mitigation requirement is sufficient to offset the losses of aquatic resource functions and services that will occur as a result of keeping the facility within the maintenance baseline. Maintenance-related discharges that do not exceed the established maintenance baseline will not result in losses of aquatic resources beyond those addressed at the time the maintenance baseline is established. The frequency of maintenance will depend on the characteristics of the flood control facility and the surrounding area. Those flood control facilities that were constructed in more dynamic environments generally require more frequent maintenance. Because of the various environmental factors affecting the need for maintenance and the physical parameters that apply to an existing facility, it would be difficult to establish a maintenance baseline that lessens the frequency of maintenance. We do not believe it would be appropriate to modify this NWP to authorize temporary stockpiling of sediments and other materials in waters of the United States. Sediments and other materials removed during the maintenance of flood control facilities must be deposited at non-jurisdictional areas, unless the district engineer authorizes temporary stockpiling through a separate Department of the Army authorization.

The previous commenter also remarked that the provisions for emergency situations still require that the permittee submit a pre-construction notification and wait for Corps approval before conducting any emergency work within the flood control facility. They stated that this requirement could compromise public health and safety, as it typically takes one or two days, minimum, to obtain the necessary approval to proceed. They requested deferral of the pre-construction notification requirement until after the emergency maintenance activities have been conducted. We believe that NWP 31, as proposed, is a reasonable and prudent way to minimize the burdens imposed on permittees, within the constraints of applicable law and regulation. It is not appropriate to defer the submittal of a pre-construction notification, due to the fact that the Corps must determine if authorization by this NWP is applicable. The Corps has developed specific procedures for dealing with emergency situations. Entities responsible for maintaining flood control facilities should contact their local Corps office well in advance of the rainy season, to familiarize themselves with the available emergency processing procedures for that district.

One commenter suggested that activities authorized by this NWP instead be authorized by NWP 3. We believe that the specific requirements of this NWP are necessary to ensure that impacts to the aquatic environment are minimal. Incorporating these requirements into NWP 3 would be confusing and make implementation of that NWP more difficult.

Another commenter asserted that this NWP has the potential for more than minimal impacts, based on the fact that there are no limits on acreage or volume of discharges. The commenter also commented that one-time mitigation does not adequately ensure that aquatic functions will be restored, and that limiting mitigation to one-time will result in more than minimal adverse impacts if mature wildlife habitat is destroyed repeatedly. The Corps believes that activities authorized by NWP 31 that comply with the maintenance baseline provision do not result in more than minimal impacts, even without acreage limitations. The establishment of the maintenance baseline, in effect, identifies the location and physical dimensions of waters of the United States that have been incorporated in the flood control facility. Discharges that result in losses of these waters (i.e., that exceed the maintenance baseline) are not eligible for authorization under NWP 31. In light of this, we believe that the ''one-time mitigation requirement'' imposed in conjunction with the establishment of the maintenance baseline is sufficient for the purpose of this NWP. The intent of the one-time mitigation is to replace the aquatic functions that may be lost each time maintenance is performed. Once the mitigation is in place, any aquatic functions that develop between maintenance activities, are over and above the level of function that existed before the initial maintenance occurred. For areas or projects with specific issues, the division and district engineer may choose to add regional conditions or special conditions to the NWP authorization.

One commenter made reference to a particular project containing salmonids and stated that an NWP should not have been issued for that particular project. The commenter objected to this NWP authorizing the continued maintenance of the project because the salmonid habitat may have partially recovered and would be repeatedly impacted. While we agree that this can occur, we do not agree that requiring mitigation over and over for what is, in effect, the same impact is appropriate. We believe that the limitations and general conditions included within this NWP will ensure that it will result in no more than minimal effects. The requirement for an approved baseline and the ability to require mitigation provides a way to safeguard valuable habitat.

This NWP is reissued as proposed.

NWP 32. *Completed Enforcement Actions.* We proposed to eliminate the phrase ''For either (i), (ii), or (iii) above,'' from the last paragraph of this NWP. In addition, we proposed to remove the phrase ''or fails to complete the work by the specified completion date.''

Two commenters suggested that the five-acre non-tidal water or one-acre tidal water limits be eliminated. They believe that if the NWP applied to enforcement actions with greater impacts, then the mitigation could be completed earlier which would reduce

temporal losses. One commenter said that the NWP should have a limit of two acres for wetland impacts, since the permit process, including the opportunity for public comment, has been avoided. One commenter stated that individual permits should be required for activities undertaken as a result of an enforcement action. They believe that greater oversight is appropriate for a party that broke the law.

We believe that if the unauthorized activity impacts more than five acres of non-tidal waters or one acre of tidal waters that it may be more appropriate to either require an individual permit review or to pursue a judicial settlement or judgment. In cases where judicial settlements are pursued, there is usually a comprehensive evaluation of the environmental damage associated with the unauthorized work and substantial mitigation and penalties. In addition, we recognize that the limits for this NWP exceed the limits for the majority of the NWPs. We believe however, that the requirement that non-judicial settlements provide for environmental benefits equal to or greater than the environmental harm caused by the unauthorized activity ensures that the net impacts caused by the unauthorized work are no more than minimal. The thresholds limit the maximum size of the impact area and, wherever appropriate and practicable, restoration of this area will be required to undo the impacts. In any case, full compensation for the impacts in some form is required.

One commenter requested we delete the sentence stating that the NWP does not apply to any activities occurring after the date of the court decision, decree or agreement that are not for the purpose of mitigation, restoration or environmental benefit. The commenter believes that this provision limits the ability of the Corps to enter into a settlement agreement. Another commenter requested that language be added to the NWP to expressly prohibit its use for any future impacts related to the existing project that is under the enforcement action.

The Corps believes that the NWP as proposed is appropriate. Proposed additional project impacts (e.g., impacts necessary to complete the project that was initiated without a permit) must be evaluated under other NWPs, regional general permits, or individual permit review processes. This permit is intended only to authorize past discharges along with the required compensatory activities, not to substitute for applicable permit requirements for future activities.

One commenter remarked that the activities authorized by this NWP do not correlate with the programmatic general permits in the commenter's state.

The Corps acknowledges this comment, however, we believe it is simply a statement and does not warrant any changes to the proposed NWP.

This NWP is reissued as proposed.

NWP 33. *Temporary Construction, Access, and Dewatering.* We proposed to divide the first sentence of this NWP into two sentences, to clarify that the NWP can be used to authorize temporary activities associated with both construction projects that do not otherwise require permits from the Corps or the U.S. Coast Guard, and those that do require and have obtained such permits. We also proposed to move the requirement for a restoration plan from the ''pre-construction notification'' general condition (general condition 13 of the 2002 NWPs) to the ''Notification'' paragraph of this NWP, because it only applies to this NWP. We inadvertently used the term ''mitigation plan'' in the ''Notification'' paragraph in the proposed NWP, and have changed it to ''restoration plan'' in the final permit. The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area will be restored to pre-project conditions. The restoration plan should also describe reasonable measures for avoidance and minimization of adverse effects to aquatic resources. Please note that this restoration plan is different from the mitigation requirements in general condition 20 for permanent losses of waters of the United States. We proposed to remove the sentence that states that the district engineer will add special conditions to ensure minimal adverse effects, since the addition of special conditions where necessary to ensure minimal adverse effects is a condition of all NWPs.

One commenter suggested that NWP 33 should also be used to authorize temporary stockpiles and temporary fills that are related to construction activities.

The Corps agrees that this work could potentially be authorized under NWP 33 as long as all other conditions are met and the work is the minimum necessary to complete the project. However, the districts have discretion in determining if the work is the minimum necessary.

One commenter expressed concern about the last statement in this NWP, which requires a Section 10 permit for structures left in place. The commenter indicated this statement is contradictory since any structures left in place would be permanent and would not qualify for the NWP 33 anyway. The commenter recommends removing or clarifying this statement.

This statement is intended to reiterate that if any structures are left in place, separate authorization is required, however we have broadened it to cover all situations where structures left in place require separate Section 10 authorization.

Another commenter generally supported NWP 33 as proposed, but recommended changing the word ''conditions'' to ''contours'' in the sentence stating ''Following completion of construction, temporary fill must be entirely removed to upland areas, dredged material must be returned to its original location, and the affected areas must be restored to the pre-project conditions.'' Several commenters indicated that requiring the area to be restored to pre-project conditions may not be beneficial when the pre-project conditions were degraded. One commenter suggested we require the affected areas be restored to the pre-project conditions or to a condition with greater than pre-project habitat functions and services. Another commenter suggested saying that the area should be returned to appropriate pre-existing stable elevations and slope and restored with vegetation species matching the adjacent undisturbed areas, but consistent with the purposes of the associated project for which the temporary construction is necessary.

We agree that returning a degraded area to better than pre-existing conditions is beneficial and we support this concept. We will not require the area to be restored to create better habitat functions and services, but we are not precluding this work from occurring. Removal of temporary fills is also addressed in general condition 13 and the language in NWP 33 has been slightly modified to match this general condition. Any fill left in place will require separate authorization.

One commenter questioned whether the restoration plan for temporary and permanent impacts could be included in a single plan, with any proposed mitigation, and whether the mitigation plan must be submitted concurrently with the pre-construction notification. Another commenter opposed the provision requiring that a restoration plan be included in the pre-construction notification that shows how the area will be restored to pre-project conditions. The commenter was concerned that a restoration plan is not always developed up front because a contractor is often not selected until after a permit has been issued.

The pre-construction notification must contain a restoration plan showing how all temporary fills and structures will be removed and the areas restored to pre-project conditions. The restoration plan must, at a minimum, include a general description of how restoration will be accomplished, with as much detail as is practicable when the pre-construction notification is submitted. We do not believe that selection of a contractor is necessary for the development of an appropriate restoration plan.

Several commenters requested that we clarify or define some of the terms in NWP 33, such as cofferdam, access fill, and temporary structure. One of the commenters also asked if the Corps considers temporary construction pads to be a form of access that requires authorization. They also asked if cofferdam includes structures that only partially isolate a portion of the streambed but still allow water to pass.

The Corps believes that cofferdam, access fill, and temporary structure are widely used and accepted terms. The Corps is hesitant to place strict definitions on these terms. The Corps does consider temporary construction pads to be a form of access that can be authorized under NWP 33 and we do consider a structure that partially blocks a portion of the streambed to be a cofferdam that could be authorized by NWP 33.

One commenter suggested that notification should not be required for temporary impacts that last less than 24 hours, when used with Best Management Practices. Another commenter requested we include a limit on the duration of impacts, such as 48 hours. Another commenter requested that the Corps consider an exemption to the pre-construction notification requirement if the temporary fill is a mat instead of dirt, or a stabilized material, and it is in place for only a short time, such as 48 hours. This commenter also suggested that the Corps allow an exemption to the pre-construction notification requirement for minor amounts of temporary impacts. A commenter questioned whether a water-inflated cofferdam would be considered *de minimus* and be exempt from submitting a pre-construction notification. Several commenters recommended that a PCN should not be required for temporary construction access roads and other construction activities covered under NWP 33, unless the discharge causes the temporary loss of greater than 1/10 acre of waters of the United States.

We have modified NWPs 3, 12, and 14 to address concerns regarding pre-construction notification and temporary impacts to waters of the United States. In particular, we are not requiring separate authorization under NWP 33 for temporary impacts associated with activities authorized under these three NWPs. Therefore, we are retaining the pre-construction notification requirements from the September 26, 2006, proposal for NWP 33. We have modified the text of this NWP to require restoration of affected areas to pre-construction elevations, with revegetation, as appropriate, to be consistent with the changes to general condition 13, Removal of Temporary Fills.

This NWP is reissued with the modification discussed above.

NWP 34. *Cranberry Production Activities.* We proposed to rearrange the text of the NWP and to eliminate the phrase ''provided the activity meets all of the following criteria''. In addition, we proposed to eliminate the requirement for delineations of special aquatic sites from the text of the NWP, since this is a requirement of general condition 27.

One commenter requested clarification of the last part of the last sentence which reads ''. . .and the NWP would authorize that existing operation, provided the 10-acre limit is not exceeded.'' Another commenter recommended reducing the acreage limit to 1/2 acre. This commenter also said that pre-construction notifications must clearly indicate areas to be impacted by the proposed activity.

We believe that the text of this NWP is clear. This NWP only authorizes activities associated with existing cranberry production operations, such as expansion, reconfiguration or leveling. The NWP provides authorization for these types of activities, provided the total impacts to waters of the United States during the 5-year term of the NWP do not exceed 10 acres. It does not authorize the construction of new cranberry production operations. Since this NWP authorizes only existing cranberry production activities, the 10-acre limit is appropriate because these areas remain as wetlands, even though they are managed to improve cranberry production. General condition 27 requires prospective permittees to submit delineations of waters of the United States with their pre-construction notifications, so that the impacts of the proposed activity can be assessed.

Some commenters asserted that the activities authorized by this NWP will result in more than minimal adverse impacts, individually and cumulatively. These commenters also requested that the Corps not reissue this permit as it violates section 404(e) of the CWA and the section 404(b)(1) Guidelines. In addition, they remarked that it is unclear how the permittee would determine whether a net loss occurs. They were concerned that permittees would claim that converting a natural wetland to a cranberry bog does not result in a net loss of wetlands and as a result these losses would not be counted. In addition, one commenter remarked that the Corps should not rely on compensatory mitigation to offset the potential adverse impacts associated with conversion of wetlands to cranberry bogs.

We believe that the activities authorized by this NWP will not have more than minimal impacts both individually and cumulatively. This NWP authorizes activities associated with the expansion, enhancement, or modification of existing cranberry operations. This NWP does not authorize new operations. Regarding the determination of net loss, this NWP requires pre-construction notification. The district engineer will determine if the proposed project would result in a net loss of wetland acreage, not the permittee. In making this determination, the Corps would consider conversion of natural wetlands to cranberry bogs a loss of waters. We believe the pre-construction notification requirement gives district engineers the ability to assess the impacts to aquatic resources and, if the acreage limit is exceeded or if otherwise warranted, exercise discretionary authority and require an individual permit. The individual permit process includes case-specific reviews to ensure compliance with the Section 404(b)(1) Guidelines. In addition, division and district engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. The Corps believes that this NWP is fully in compliance with section 404(e) of the Clean Water Act.

One commenter stated that the Corps' limited cumulative effects data suggests a reduction in average impacts associated with this NWP. They added that this reduction appears to be due to cranberry production activities being authorized under state or regional general permits.

We believe that the use of state programmatic and regional general permits to authorize cranberry operations are appropriate. All general permits must have no more than minimal adverse effect. Regional general

permits developed in consideration of local and regional issues have been determined to have minimal impacts both individually and cumulatively. As with the NWPs, regional general permits also enable the district engineer to exercise discretionary authority to require individual permit review, where appropriate.

The NWP is reissued as proposed.

NWP 35. *Maintenance Dredging of Existing Basins.* We proposed to change the phrase ''disposed of'' to ''deposited at'' in the text of this NWP.

One commenter suggested the NWP be modified to allow disposal of dredged material (e.g., sand and gravel) in the littoral system.

We believe the placement of dredged material at upland sites with the implementation of proper siltation controls helps to ensure minimal impacts on the aquatic environment, individually and cumulatively. We agree that beneficial use of dredged material, including placement of suitable material on beaches or in the littoral zone, can provide environmental benefits. However, such activities can result in unintended adverse environmental effects, and therefore require detailed and comprehensive analysis of sediment and littoral processes. We believe that an individual permit is the appropriate mechanism for authorizing this use of dredged material and that it should not be permitted under this NWP.

Another commenter requested that we require pre-construction notification to help determine whether dredging activities authorized under this NWP may indirectly adversely impact adjacent beaches and near shore habitat.

Generally, dredging of existing basins does not result in substantial adverse impacts to adjacent beaches and/or near shore habitat when proper siltation controls are used, as required by this NWP. We disagree that pre-construction notification is necessary for these dredging activities since division engineers have the ability to impose regional conditions, including the requirement for pre-construction notifications for certain activities, to ensure minimal adverse effects on the aquatic environment, individually and cumulatively.

One commenter remarked that we should provide clarification on the applicability of this NWP to existing access channels and mooring facilities.

This NWP authorizes excavation and removal of accumulated sediment for maintenance of existing basins provided that the activity complies with its terms and conditions.

This NWP is reissued as proposed.

NWP 36. *Boat Ramps.* We proposed to modify this NWP to allow district engineers to waiver the 50 cubic yard limit for discharges of dredged or fill material into waters of the United States to construct a boat ramp. We also proposed to allow district engineers to waiver the 20 foot width limit for boat ramps. These waivers can be issued only if, after reviewing a pre-construction notification, the district engineer determines that adverse effects on the aquatic environment and other factors of the public interest will be minimal.

Many commenters supported the discretion vested in district engineers to waive the limitations imposed by this NWP, however one commenter objected to the flexibility provided to the district engineers and suggested activities that exceed 50 cubic yards or 20 feet in width be evaluated under an individual permit process. Another commenter requested we include guidelines for when and to what degree the district engineer would apply waivers to the 50 cubic yard fill limit and/or 20-foot width limit to avoid inconsistencies.

We believe deference must be given to district engineers' expertise and knowledge of the local aquatic environment, as well as his/her assessment of information submitted in pre-construction notifications, to make case-specific determinations on the effects to the aquatic environment. The proposed pre-construction notification requirement for discharges that exceed 50 cubic yards or 20 feet in width will enable the district engineer to evaluate the direct, indirect and cumulative effects of a proposed activity to determine whether a waiver is appropriate or an individual permit is required. Because of the inherent variability across the nation, we disagree that it is necessary or appropriate to establish guidelines for the application of the waiver. We expect district engineers to formulate their case-specific determinations on the appropriateness of the waiver based on the unique characteristics of the local aquatic environment and in consideration of the specific circumstances of the proposed activity.

One commenter noted that boat ramps are hardened surfaces that diminish near shore or bank habitat and asserted that pre-construction notification should be required along with mitigation.

We believe that the discretion vested in district engineers to issue special conditions on a case-specific basis, including requirements for appropriate and practicable mitigation (see general condition 20), will ensure that losses to the aquatic environment are adequately offset. We also believe that the ability of division engineers to impose regional conditions for certain activities will ensure minimal adverse effects on the aquatic environment, individually and cumulatively.

Two commenters indicated that the case-by-case waiver of the 50 cubic yard and 20-foot width discharge limits should also require the Corps to coordinate with appropriate federal and state natural resource agencies.

We disagree it is necessary to coordinate with federal and state natural resource agencies prior to the district engineer determining whether to grant a waiver for those activities that exceed the 50 cubic yard fill limit and/or 20-foot width limit. District engineers have the aquatic resources expertise to determine whether activities will result in more than minimal adverse effect on the aquatic environment.

One commenter noted that activities authorized under this NWP do not require Department of the Army authorization in Section 404-only waters unless there is more than incidental fallback.

Discharges in waters of the United States that are not otherwise exempt from regulation require Corps authorization. We acknowledge that the Corps does not regulate excavation under section 404 in instances when there is only incidental fallback.

This NWP is reissued as proposed.

NWP 37. *Emergency Watershed Protection and Rehabilitation.* We proposed to rearrange the text of this NWP to match the other permits. In the final permit, we have added two additional types of activity (reclamation of abandoned mine lands pursuant to Title IV of SMCRA and the Emergency Conservation Program administered by the Farm Service Agency) that may be authorized.

One commenter supported the reissuance of this NWP without change, since they regularly partner with the Natural Resources Conservation Service on emergency projects. Another commenter expressed concerns that NWP 37 does not contain specific requirements for conducting repair work and it only includes generic references to environmentally defensible approaches. The commenter agreed that allowing the work to commence immediately (with follow-up permitting as necessary) may be desirable due to the urgency of some disaster responses; however, they indicated that the process may be prone to uncertainty about requirements and may cause more than minimal harm to the aquatic resources. The commenter indicated that activities

are funded by the Natural Resources Conservation Service but not always implemented by the agency, so people with limited experience may be completing the work. The commenter suggested that work should only be allowed to proceed prior to verification where a damage response team comprised of federal and state agencies have developed the site specific plans for damage repair.

We believe that in some cases the urgency of the activities authorized by this NWP requires an expedited process. All activities require pre-construction notification, and as a general matter, the prospective permittee should wait until the district engineer issues an NWP verification before proceeding with the watershed protection and rehabilitation activity. A watershed protection and rehabilitation activity may proceed immediately only in those cases of true emergencies (i.e., where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur). Where practicable, permittees are encouraged to consult informally with the Corps before proceeding with emergency activities. In cases where emergency watershed protection and rehabilitation activities were conducted prior to receiving an NWP verification, the district engineer, after reviewing the pre-construction notification, may modify, suspend, or revoke the NWP authorization through the procedures at 33 CFR 330.5. All of the projects authorized by this permit are conducted under the sponsorship of another Federal resource management agency. Those agencies, not the Corps, have the responsibility to determine whether the project complies with their program authority. The Corps must determine the applicability of the NWP to the specific project, but for the most part, the Corps only reviews the proposed work to determine compliance with the requirements of the NWP and the general conditions. We believe that any specific concerns should be addressed through regional conditions or through consultation with the sponsoring agency.

A couple of commenters recommended adding Title IV of the Surface Mining Control and Reclamation Act, which governs the abandoned mine land reclamation program, to proposed NWP E, Coal Remining Activities. One commenter suggested adding to NWP 37 work funded by the Farm Service Agency under its Emergency Conservation Program, which rehabilitates farmland damaged by natural disasters.

As discussed below, we have revised proposed NWP E (now designated as NWP 49), to authorize abandoned mined land reclamation activities that also involve coal extraction activities. However, for those abandoned mine land reclamation activities that do not involve coal extraction, we believe it is more appropriate to authorize these activities under NWP 37, since they help protect and rehabilitate watersheds, and have revised the text of the NWP accordingly. In cases where it is necessary to conduct an emergency abandoned mine reclamation activity immediately, the project proponent may proceed with the work (see paragraph (d)(3) of general condition 27) while the district engineer reviews the pre-construction notification. For clarity, we have also added a new paragraph to this NWP that is consistent with paragraph (d)(3) of general condition 27. We have also added Emergency Conservation Program activities funded by the Farm Service Agency, which provides cost-share assistance to eligible participants to rehabilitate farmland damaged by floods, hurricanes, or other natural disasters. The implementing regulations for the Emergency Conservation Program are found at 7 CFR part 701.

The NWP is reissued, with the modifications discussed above.

NWP 38. *Cleanup of Hazardous and Toxic Waste.* We proposed to modify this NWP by moving the requirement to submit a delineation of waters of the United States to paragraph (b)(4) of the ''pre-construction notification'' general condition (GC 27). We also proposed to move the last sentence of this NWP to a ''Note'' at the end of the NWP.

One commenter requested this NWP be revoked, because the cleanup of hazardous waste has the potential to cause adverse effects during and after the activities. The commenter indicated that remedial activities in navigable waters and wetlands need site-specific review, evaluation and permitting to ensure proper design, appropriate restoration, and long term stability.

This NWP requires pre-construction notification to the Corps. We believe our review under this NWP is sufficient, since the activities authorized must be performed, ordered, or sponsored by a government agency with established legal or regulatory authority.

Another commenter suggested the expansion of this NWP to allow removal of waste material, such as trash, debris, detritus, or rubble, in waters of the United States. The commenter suggested that the NWP should be modified to authorize the immediate removal of the waste and the notification to the Corps after the material has been removed.

In general, the removal of waste material should not require Corps authorization, unless the activity involves discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States. Temporary access to remove the material may be authorized by NWP 33. Restoration of the affected area may be authorized under NWP 27.

One commenter requested clarification regarding the applicability of NWP 38 for emergency response to an oil release in waters of the United States from electrical equipment that is not covered by a Spill Prevention, Control, and Countermeasure (SPCC). The releases are governed by EPA's polychlorinated biphenyl spill response regulations (40 CFR part 761). Because the activities are not included in a SPCC Plan, they are not authorized by NWP 20. The work that is required must be initiated within 24 or 48 hours of discovery of the release, so the commenter requested that either NWP 20 be modified or the pre-construction notification requirement under NWP 38 be removed in situations where the response time is critical.

Instead of modifying this NWP, we have modified NWP 20 to include coverage of response to spills not covered by a SPCC Plan, but otherwise required to be initiated in a short time frame by another government agency, such as EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761.

This NWP is reissued as proposed.

NWP 39. *Commercial and Institutional Developments.* We proposed to modify this NWP by moving the provisions authorizing residential developments to NWP 29, requiring pre-construction notification for all activities authorized by this NWP, and applying the 300 linear foot limit to ephemeral streams.

Three commenters objected to moving residential developments from NWP 39 to NWP 29 because these developments are inconsistent with the original intent of NWP 29. Six commenters supported removing residential developments stating that the impacts associated with residential developments are not the same as commercial and institutional developments. Three commenters desired the ability to use multiple NWPs with NWP 39 for mixed-use developments, such as housing and commercial. One commenter did not support removing residential development from this NWP because mixed-use developments would lead to more than minimal impacts if multiple NWPs were used.

As discussed in the preamble to the September 26, 2006, **Federal Register**

notice, the proposed changes effectively eliminates the previous NWP 29. We do not believe that NWP 39 will result in more than minimal individual and cumulative adverse effects, on the aquatic environment if it is used with other NWPs in accordance with general condition 24, Use of Multiple Nationwide Permits.

Two commenters recommended allowing the NWP to be used in non-tidal wetlands adjacent to tidal waters, while another agreed with the proposed language to exclude its use from these wetlands. One commenter declared that the NWP should not be used in wetlands accessible to anadromous fish or in difficult-to-replace aquatic environments. One commenter wanted the acreage limit increased to 5 acres and another recommended it be decreased to ¼ acre so that it reflects the limits in the previous version of NWP 29.

We believe that restricting the types of wetlands the NWP applies to is an appropriate method of assuring that minimal adverse impacts are not exceeded. Division engineers may regionally condition or revoke this NWP in certain areas or for certain activities if they believe the NWP would result in more than minimal impacts. Increasing the acreage limit to 5 acres would likely result in activities that will have more than minimal individual and cumulative adverse effects on the aquatic environment. Reducing the acreage limit to ¼ acre would cause many projects that do have minimal adverse impacts to be evaluated under the individual permit process.

Many commenters supported retaining the language requiring sufficient vegetated buffers to be maintained adjacent to all open water bodies, such as streams. One commenter requested an unspecified minimum vegetated buffer width while two commenters suggested a 200 foot setback from streams containing anadromous fish. One commenter supported removing of the buffer language and relying on paragraph (d) (now designated as paragraph (f)) of general condition 20.

In general, the Corps agrees that buffers (i.e., riparian areas) are necessary to protect streams and other open waters. District engineers will make determinations regarding the need for and amount of required riparian areas in the context of general condition 20, Mitigation.

One commenter stated that including the expansion of commercial or institutional buildings will lead to piecemealing projects and result in more than minimal impacts on the aquatic environment. Five objected to removing language concerning avoidance and minimization to the maximum extent practicable. Two commenters suggested maintaining language requiring a conceptual mitigation plan. Several commenters recommended retaining the language concerning single and complete projects. Two commenters asserted that maintaining language addressing minimal change to flow and water quality was necessary. Two commenters objected to removal of language concerning minimizing on-site and off-site impacts, such as avoiding flooding of adjacent lands. Another commenter objected to removing ''many'' of the restrictions in the NWPs, including this one. One commenter suggested that problems will occur without the language about ''single and complete projects.''

We disagree with these comments. Requirements for avoidance and minimization, management of water flows, and water quality are provided in the NWP general conditions. Removal of language from the permit text itself does not affect the applicability of requirements contained in Corps regulations and in the NWP general conditions. We have repeatedly emphasized in this preamble that permittees must review the general conditions before using any NWP to ensure that they are meeting all requirements for its use. District engineers will review pre-construction notifications to ensure that all practicable on-site avoidance and minimization has been accomplished. In response to a pre-construction notification, the district engineer may require compensatory mitigation to ensure that the authorized activity results in minimal adverse environmental effects (see 33 CFR 330.1(e)(3)).

Several commenters objected to the mandatory pre-construction notification requirement and suggested a pre-construction notification threshold of 1/10 acre or greater than 300 feet of stream loss. Some of these commenters reasoned that eliminating the 1/10 acre pre-construction notification threshold would be a disincentive to avoid the loss of waters of the United States. Two commenters supported the proposed pre-construction notification requirement.

We disagree that the pre-construction notification threshold should be 1/10 acre. We acknowledge that this will result in an increase in the number of pre-construction notifications district engineers receive, however, we are proposing to simplify the information required in a pre-construction notification (see general condition 27) to reduce the paperwork burden on prospective permittees. Requiring notification for all activities authorized under NWP 39 will help ensure adverse minimal effects.

Thirteen commenters wrote concerning impacts to streams and the use of waivers. See the discussion regarding this topic, above.

One commenter stated that projects authorized by this NWP are not water-dependent and should not be permitted.

We agree that most commercial and institutional developments are not water dependent activities. This does not mean that they cannot be permitted, only that they undergo an alternatives analysis (see the EPA's 404(b)(1) Guidelines at 40 CFR part 230). Although analysis of off-site alternatives is not required for general permits, each proposed project is evaluated to determine whether avoidance and minimization has been accomplished on the project site to the maximum extent practicable (see general condition 20, Mitigation). In addition, the activity is not authorized under an NWP if the adverse impacts to waters of the United States are more than minimal.

This NWP is reissued as proposed.

NWP 40. *Agricultural Activities.* We proposed to modify this NWP to require pre-construction notification for all activities, authorize the construction of farm ponds in waters other than perennial streams, and remove certain restrictions on who could use the NWP.

One commenter wanted to retain the paragraph numbering of the 2002 NWP. Another commenter said that this NWP should be limited to USDA program participants.

The Corps believes the revised numbering system is appropriate and easy to understand. This NWP should not be limited to USDA program participants, since there are agricultural activities being conducted by non-participants that result in minimal adverse effects on the aquatic environment which are appropriately authorized by NWP.

One commenter opposed reissuance of NWP 40 because of unacceptable impacts to wetlands. Two commenters did not support eliminating the ½ acre limit per farm tract on impacts to waters of the United States, and one commenter recommended reducing the acreage limit to 1/10 acre. One commenter expressed concern that removing farm tracts as the basis for the acreage limit would result in use of this NWP to authorize discharges of dredged or fill material for non-agricultural activities. One commenter stated that

roadside stands should not be considered farm buildings for authorization under this NWP. One commenter recommended retaining the 1/10 acre threshold for pre-construction notification. One commenter stated that pre-construction notification should not be required for projects conducted under USDA programs.

We believe the requirement for pre-construction notifications for all activities and the case-by-case review by district engineers will ensure that activities authorized by this NWP result in no more than minimal individual and cumulative adverse effects to the aquatic environment and other public interest review factors. The district engineer will add case specific conditions and require mitigation when needed to ensure impacts do not exceed the minimal level, and will assert discretionary authority to require an individual permit when impacts are more than minimal. Due to differences in program requirements between USDA programs and Section 404 of the Clean Water Act, it is not possible to ensure that activities conducted under USDA programs will necessarily comply with Section 404 requirements and have minimal adverse impact to waters of the United States. Therefore, we are retaining the pre-construction notification requirement for USDA program participants and projects. We have removed the reference to ''farm tracts'' because we have found that it caused confusion in the past. The limit applies to each single and complete project (see definitions section). District engineers will determine during the pre-construction notification process whether the acreage limit is satisfied. Eliminating the use of farm tracts would not expand the use of this NWP to non-agricultural activities. The text of this NWP clearly states that it authorizes only agricultural activities.

One commenter objected to authorizing farm ponds in wetlands and two objected to authorizing farm ponds in non-tidal waters excluding perennial streams. One commenter supported the use of NWP 40 for construction of farm ponds only in streams without aquatic life use designations. Another commenter said that the proposed modification was unnecessary, since many farm ponds are constructed outside of waters of the United States or they are exempt from section 404 permit requirements because of the exemption at Section 404(f)(1)(C) of the Clean Water Act. This commenter expressed concern that the proposed changes to NWP 40 would require landowners to submit pre-construction notifications for all farm ponds, even if they are not constructed in waters of the United States or they qualify for the section 404(f) exemption.

We are limiting the construction of farm ponds to certain types of waters where the adverse effects to the aquatic environment are likely to be minimal, individually and cumulatively. This NWP does not authorize the construction of farm ponds in perennial streams. Under this NWP, farm ponds may be constructed in non-tidal wetlands, intermittent streams, and ephemeral streams. Pre-construction notification is required for all activities authorized by this NWP, so that district engineers will have the opportunity to review each proposed activity to determine whether the adverse effects on the aquatic environment will be minimal. If the construction of a farm pond does not involve discharges of dredged or fill material into waters of the United States, or if it qualifies for a Section 404(f) exemption, the project proponent is not required to submit a pre-construction notification. This NWP authorizes the construction of farm ponds that involve discharges of dredged or fill material into waters of the United States and do not qualify for the Section 404(f)(1)(C) exemption, because of the recapture provision at Section 404(f)(2). We have added a sentence to the ''Note'' at the end of this NWP to clarify that this NWP is used to authorize the construction of farm ponds that are not exempt under Section 404(f).

One commenter was concerned about negative impacts to salmonids from agriculture activities. Of main concern was placement of farm buildings in wetlands and streams, discharges from drainage tiles into farm ditches that were built in salmonid streams, and levee maintenance that degrades salmonid habitat and riparian areas.

Potential adverse impacts from these activities will be addressed during the pre-construction notification review. Water quality issues are also addressed during Section 401 water quality certification or by a Clean Water Act Section 402 permit.

Two commenters stated that the proposed permit will destroy wetland acres. One commenter stated that the loss of prairie potholes and western glaciated potholes will be staggering. Another commenter stated that discharges into playas, prairie potholes, and vernal pools should not be allowed under NWP 40.

The 1/2-acre limit for this NWP applies to the loss of waters associated with activities authorized by this NWP. During the pre-construction notification review process, if the district engineer determines that adverse effects to aquatic resources are more than minimal, individually or cumulatively, he or she will impose special conditions to reduce the impacts to the minimal level or assert discretionary authority and require an individual permit. In addition, division engineers may add regional conditions to this NWP to restrict or prohibit its use in certain types of waters, if discharges into those waters for agricultural activities would result in more than minimal adverse effects on the aquatic environment. General condition 20, Mitigation, requires district engineers to determine appropriate and practicable mitigation necessary to ensure that impacts are no more than minimal. The Corps believes the pre-construction notification requirement for all activities and the case-by-case review by district engineers will ensure that activities authorized under this NWP will result in no more than minimal individual and cumulative adverse effects to the aquatic environment. The Corps notes that the acreage and linear foot limits in the NWPs apply only to waters that are jurisdictional under the Clean Water Act.

One commenter stated that the Corps now proposes to ignore impacts to waters of the United States associated with agricultural dredge and fill activities that are deemed exempt under Section 404(f) of the Clean Water Act.

This NWP authorizes certain agriculture activities that are not eligible for the exemptions under Section 404(f) of the Clean Water Act. Those agricultural activities that qualify for the Section 404(f) exemptions do not require a Section 404 permit. This has always been the case; it is not a change from current practice.

One commenter stated that the possible waiver for the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in intermittent and ephemeral streams would result in more than minimal adverse impacts. Another commenter said that the provision authorizing the relocation of existing serviceable drainage ditches constructed in non-tidal streams should be conditioned to ensure that the activity does not result in a reduction in base flow to the stream.

In response to a pre-construction notification for the proposed relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in intermittent or ephemeral streams, the activity is not authorized unless the district engineer issues a written waiver after determining that the activity will result in minimal adverse effects on the aquatic environment. The relocation of

drainage ditches must also comply with general condition 9, Management of Water Flows, to maintain the capacity of those waters to the maximum extent practicable.

Several commenters stated that some language in the NWP was confusing or needed clarifying. This included the phrase ''ditches constructed in waters of the United States'', whether the permit applies to farm tracts or the entire farm, and the concept of ''necessary for agriculture production''.

We have removed the definition of ''farm tract'' and the conditions limiting the use of NWP 40 on a particular site, since district engineers will receive pre-construction notifications for all activities authorized by this NWP. District engineers will review pre-construction notifications for those NWPs to ensure that the proposed work results in minimal individual and cumulative adverse environmental effects. We believe that the other terms are self-explanatory. Determining whether an activity is necessary for agriculture production involves some discretion, which the district engineer will apply when evaluating pre-construction notifications for proposed projects.

One commenter said that this NWP should not authorize the construction of livestock watering ponds unless the applicant submits documentation showing that he or she has obtained government assistance for the construction of the pond, and that no feasible alternatives are available that would avoid discharges into waters of the United States. This commenter supported the proposed prohibition against constructing farm ponds in perennial streams, but also recommended that the NWP prohibit the construction of farm ponds in oxbows or lakes. Another commenter stated that NWP 40 should authorize the construction of aquaculture ponds.

We do not agree that it is necessary to require prospective permittees to obtain government assistance as a condition of authorization under this NWP. General condition 20, Mitigation, requires permittees to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site. District engineers will also review pre-construction notifications to ensure compliance with the terms and conditions of this NWP, including general condition 20. If a farm pond is proposed to be constructed in an oxbow or a lake, the district engineer will review the pre-construction notification to determine if the activity will result in minimal adverse effects. In addition, division engineers may also regionally condition this NWP to restrict or prohibit its use to construct farm ponds in certain categories of non-tidal waters of the United States. We believe that construction of aquaculture ponds is a distinct activity that should not be authorized under this NWP because there may be unique issues associated with it (e.g., invasive species concerns, changes in water quality). Ponds constructed for purposes other than conventional agriculture may be authorized under other general permits or individual permits.

This NWP is reissued as proposed.

NWP 41. *Reshaping Existing Drainage Ditches.* We proposed to modify this NWP to clarify that it authorizes only the reshaping of drainage ditches constructed in waters of the United States where the purpose of reshaping the ditch is to improve water quality. As a result of this modification, we also proposed to remove the sentence that states why compensatory mitigation is not required for the activities authorized by this NWP.

The purpose of this NWP is to encourage landowners who need to maintain drainage ditches constructed in waters of the United States to do so in a manner that benefits the aquatic environment. The maintenance of a drainage ditch is exempt under Section 404(f)(1)(C) of the Clean Water Act, and does not require a section 404 permit. This exemption does not apply to the reshaping of existing drainage ditches, so landowners have a disincentive to reshape their ditches, even though such reshaping can be beneficial to the aquatic environment. This NWP authorizes those reshaping activities that benefit the aquatic environment.

This NWP was first issued on March 9, 2000, (65 FR 12818) to authorize, to the extent that a section 404 permit is required, the grading of the banks of a currently serviceable ditch to gentler (shallower) slopes than its current or original configuration. Reshaping a drainage ditch so that it has shallower side slopes can help improve water quality by decreasing the velocity of water flowing through the ditch and by spreading out water flow over a greater area of soil surface. It should also provide more area for plants to become established and grow within the ditch. These changes are likely to help improve water quality by increasing water contact with vegetation and soil microbes, which facilitates the removal of nutrients and other chemical compounds through biogeochemical processes. Slower water flow rates through the ditch should also decrease erosion, further improving water quality.

We proposed to remove the prohibition against permanent sidecasting of excavated material into waters of the United States, where the excavated material results from the ditch reshaping activity. In cases where there are jurisdictional wetlands or other waters next to the ditch to be reshaped, this prohibition is likely to cause many landowners to maintain the ditch at its originally designed configuration to qualify for the exemption, since the 404(f)(1)(C) exemption allows discharges of dredged or fill material into waters of the United States resulting from ditch maintenance activities.

Some commenters supported the modifications to this NWP because they encourage landowners to maintain drainage ditches in a manner that benefits the aquatic environment. Several commenters also agreed with the proposal to remove the prohibition against permanent sidecasting of excavated materials into waters of the United States. Several other commenters did not support allowing permanent sidecasting of material excavated from reshaped ditches. These commenters suggested that the sidecasting would have adverse impacts that exceed the water quality improvements. One commenter suggested we provide conditions on the sidecast material, such as requiring the fill to be no higher than 18 inches, so that the hydric soils will retain their hydric characteristics. They also suggested requiring random distribution of the material and that the sidecast should not interfere with surface water flows. Another commenter indicated that permanent sidecasting that isolates wetlands on-site, rendering them non-jurisdictional, should not be allowed.

The exemption at 404(f)(1)(C) allows sidecasting, but prohibits reshaping drainage ditches. This NWP provides an incentive to improve water quality through reshaping the drainage ditches while still allowing sidecasting of the material. The Corps believes that allowing the sidecasting under this NWP will encourage landowners to reshape existing drainage ditches in favor of water quality improvements instead of conducting traditional maintenance activities. The Corps recognizes the need to ensure that the sidecasting has minor impacts on the aquatic environment and does not isolate wetlands. Regional conditions may be added to ensure that the individual and cumulative impacts are minimal. We note that the presence of a man-made berm between wetlands

and adjacent waters does not necessarily make the wetlands non-jurisdictional.

Some commenters suggested that many drainage ditches are within what was a historical stream that has been straightened and many of these drainage ditches are used by anadromous salmonids as transport to upstream spawning grounds and for juvenile rearing. One commenter suggested this NWP should not be used in waterbodies bearing salmon where a state or federal watershed analysis or limiting factors analysis has determined that off-channel rearing habitat is limiting or potentially limiting to salmonid production. The commenters indicated that an individual permit should be required for work in ditches that are accessible to anadromous salmonids. The commenter suggested if this NWP is utilized in such waterbodies, a regional condition should require a delineation of pools and riffles and that reshaping be conducted in a manner that does not reduce volume and surface area of pools or other suitable low velocity habitat.

The Corps agrees that these are important concerns but they only relate to certain areas. Division and district engineers will impose regional conditions or case-specific conditions, so that adverse effects to salmon species that utilize these drainage ditches are minimal, individually and cumulatively.

One commenter suggested this NWP should allow for the restoration of ditches that lose their original shape, become vegetated, and obtain characteristics of wetlands due to long ditch maintenance cycles, which are often greater than 20 years.

The Corps believes that this NWP may potentially be used in such areas in cases where the purpose of the work is to improve water quality. However, to be eligible to use this NWP, the drainage ditches must be currently serviceable and not so degraded that the area appears to have more the characteristics of a wetland than those of a drainage ditch.

One commenter suggested this NWP should authorize reshaping of natural drainage features. The commenter indicated that reshaping unvegetated streambeds, channels, and watercourses with vertical banks subject to continuous erosion would provide flatter and vegetated side slopes, which would improve water quality.

We do not agree that this NWP should be modified to authorize alterations to the geomorphology of natural streams and other waters of the United States. Such changes to natural waterbodies may result in more than minimal adverse effects to the aquatic environment. Other forms of Department of the Army authorization may be more appropriate to authorize this type of work.

Another commenter indicated that the amount of change in reshaping is not specified.

We do not believe it is necessary to place a limit on the cubic yards of change that can occur with this permit. We believe if the purpose is to reshape the ditch and improve water quality, an upper limit does not need to be specified.

One commenter indicated that the term ''* * * ditches constructed in waters of the United States'' is confusing and suggested changing it to ''serviceable drainage ditches which were constructed in regulated wetlands or by channelizing waters of the United States.'' Another commenter stated that the Corps has too narrowly defined what constitutes a drainage ditch. The commenter indicated that a large number of streams in the United States have had some channelization and some people refer to these water bodies as drainage ditches. The commenter is concerned that some natural waterbodies will be reshaped, which would actually reduce water quality.

We believe the current phrasing is simple and concise, since jurisdictional wetlands are waters of the United States. This NWP is intended for currently serviceable drainage ditches and the applicability of the NWP can be determined on a case-by-case basis by the district engineers. This NWP does not authorize the channelization of existing streams and it does not authorize the relocation of those streams. In addition, this NWP does not authorize the reshaping of natural waterbodies. If a ditch has become incised, this NWP may potentially be used to reshape the ditch, thereby making it more stable.

Another commenter is concerned about the lack of required documentation or demonstration of how the proposed reshaping will meet this basic condition of NWP eligibility. The commenter also questioned why the Corps does not define the term ''improving water quality'' and does not explain how to evaluate a project that improves some aspects of water quality, but harms others. One commenter suggested a wording change to say, ''for the purpose of stabilizing eroded banks'' instead of ''for the purpose of water quality.'' The commenter indicated that saying the work is for the purpose of improving water quality is vague and subject to misinterpretation.

The work authorized by this permit is designed to improve water quality by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. We have added this language to the NWP. More stable banks may result from these activities, but the primary objective of these projects is to improve water quality. We recognize that the environmental benefits of these activities usually need to be determined subjectively.

A commenter was also concerned that the NWP does not require an applicant to prove the proposed ditch reshaping activity will not increase the area drained by the ditch. The commenter is concerned this NWP has a high potential for abuse and will attract landowners looking for authorization to make their ditches larger to drain wetlands more thoroughly and they suggest that the Corps will need to dedicate more resources to track and monitor the use of this permit. The commenter also indicated there must be a limit on the extent of impacts authorized under this permit and that extensive reshaping of drainage ditches should be subject to individual permit review.

The Corps believes that the pre-construction notification requirement for this NWP will allow us to review larger-scale proposals and ensure that additional wetlands are not drained by the work. We have modified the text of this NWP, to prevent drainage of additional wetlands. We have replaced the phrase ''original design capacity'' with ''original as-built capacity'' to reflect the extent of drainage that occurred when the drainage ditches were originally constructed. We have also changed the word ''designed'' to ''constructed'' in that sentence to ensure that the reshaping activity does not drain additional waters. We believe these changes will help prevent increases in the area drained by these ditches, especially in those cases where the ditch did not achieve its design capacity when it was originally constructed.

A commenter recommended modifying the requirement that the capacity of the ditch must be the same as originally designed. The commenter is concerned that the only way for the capacity to remain the same is if the side slopes are increased is to narrow the bottom of the existing ditch. The commenter expressed concern about narrowing the bottom of the ditch and still having a stable system. The commenter suggested requiring the bottom width and depth of the ditch to be the same as originally designed.

We do not agree that this language should be changed, except to refer to the as-built capacity or the original construction of the ditch, for the reasons discussed above. The Corps believes that changing the language as recommended in the previous paragraph may unduly restrict the design criteria, because there may be some cases where the bottom width and depth would change, but the capacity would remain the same; therefore, we are keeping the current language. The important point is that this NWP may not be used to increase the capacity of the ditch.

A commenter requested that some provisions be made to allow for an increase in capacity to accommodate increased drainage in the watershed. Due to increased runoff, ditches may have become incised and restoring stable slopes may require increased capacity. The commenter suggested not restricting the permit to original design capacity, since this does not allow for laying back the side slopes without decreasing maximum depth to avoid increasing cross sectional area. Another commenter indicated that there may be constricted conditions that do not allow for shallow side slopes and wanted to know if there would be flexibility in the use of NWP 41.

Modifying this NWP to allow increased drainage capacity would be contrary to the intent of the NWP, which is to authorize changes in the ditch that help improve water quality. If the site characteristics do not support reshaping the ditch in a manner that improves water quality, without increasing drainage capacity, then this NWP cannot be used. Modifications of drainage ditches to accommodate changes in watershed hydrology or site limitations may be authorized by other types of Department of the Army permits.

One commenter asked if the NWP 41 would authorize the reshaping of existing drainage ditches that were not constructed in waters of the United States but now contain an ordinary high water mark or wetlands.

This NWP may be used in currently serviceable drainage ditches to the extent that they are jurisdictional. Division or district engineers can make a determination on the applicability of this NWP on a case-by-case basis.

A commenter was concerned about the prohibition against stream channelization activities. The commenter suggested that activities that modify the cross sectional configuration of drainage ditches could easily be interpreted as manipulation of a stream's condition that causes more than minimal interruption of normal stream processes. The commenter encouraged the Corps to remove the channelization restriction from NWP 41.

The intent of this NWP is to authorize the reshaping of ditches to provide more stable conditions, which will improve water quality. The Corps does not believe this permit should allow channelization of streams.

Several commenters questioned why this NWP excludes non-tidal wetlands adjacent to tidal waters. The commenters asked why it matters whether currently serviceable drainage ditches were originally constructed in non-tidal wetland adjacent to tidal waters or in upland settings.

We believe that excluding ditch reshaping activities in non-tidal wetlands adjacent to tidal waters is necessary to ensure that the adverse effects on the aquatic environment will be minimal, individually and cumulatively. Wetlands adjacent to tidal waters tend to have a high level of ecological and hydrologic connectivity with tidal waters. Ditch reshaping activities in these areas may have more than minimal adverse effects and can be better addressed by other general permits or individual permits.

One commenter stated that this NWP should have a 500 linear foot limit and a 250-foot pre-construction notification threshold and that mitigation must be required for all adverse impacts to the aquatic environment authorized under this permit. Another commenter said that the activities authorized by this NWP would result in more than minimal adverse effects.

The Corps believes that the pre-construction notification threshold is sufficient. Since we will see all proposals that are over 500 linear feet, we will have the opportunity to determine if the impacts are more than minimal. The Corps does not believe this NWP will cause a permanent loss of waters, since the work involves reshaping existing drainage ditches to improve water quality, therefore, mitigation is not required.

Several commenters suggested that removing some of the language from the NWP 41 issued in 2002 made the permit less clear. One commenter suggested that the Corps add language stating indicating that this NWP is limited to reshaping activities that would restore more natural stream characteristics such as increasing the area of riparian vegetation through regrading or recreating stream meanders.

The Corps believes that including this type of language would go beyond the intent of this NWP, which is to authorize the reshaping of existing drainage ditches that may not have ever contained meanders or other natural stream characteristics.

Other commenters suggested putting the language from the 2002 NWP 41 about compensatory mitigation back in the NWP.

The Corps agrees and the following language has been placed in the final version of NWP 41: ''Compensatory mitigation is not required because the work is designed to improve water quality.''

This NWP is reissued with the modifications discussed above.

NWP 42. *Recreational Facilities.* We proposed to modify this NWP by removing the language that limits its use to those recreational facilities that are integrated into the existing landscape and do not substantially change pre-construction grades or deviate from natural landscape contours. We also proposed to modify this NWP to require pre-construction notifications for all activities, and apply the 300 linear foot limit for losses of stream bed to ephemeral streams. In addition, we proposed to modify this NWP, to authorize the construction of ski areas, playing fields, and basketball and tennis courts.

One commenter suggested that the Corps change the word ''loss'' to ''fill'' or ''impact'' (including temporary and permanent impacts). Another commenter suggested rewording a sentence to address the Rapanos and Carabell decisions.

The Corps believes that the term ''loss'' is the appropriate term. The term ''loss of waters of the United States'' is defined in the ''Definitions'' section of the NWPs. Issues related to the jurisdictional reach of the CWA are not addressed in the NWPs or this preamble. Department of the Army Section 404 permits are required only for activities involving discharges of dredged or fill material into jurisdictional waters.

Three commenters stated that the activities authorized by this NWP are not similar in nature, and will not result in minimal adverse effects to water quality and the aquatic environment.

This NWP authorizes recreational facilities. The activities authorized by this NWP are all recreational facilities, which is a category of activity that is similar in nature. The pre-construction notification requirement gives district engineers the ability to assess the impacts to aquatic resources and, if warranted, exercise discretionary authority to add special conditions or require individual permits. Division and district engineers will condition such activities where necessary to ensure that these activities will have no more than

minimal adverse effects on the aquatic environment, individually and cumulatively.

Two commenters supported the removal of the limits on the types of recreational activities that can be authorized by this NWP. A number of commenters objected to allowing changes in preconstruction grades and deviations in natural landscape contours. Two commenters requested we prohibit the use of this NWP for golf courses, ski areas, playing fields, and basketball and tennis courts because these types of facilities are likely to alter natural landscape contours. One commenter stated that projects such as golf courses that require filling large valleys to create flatter areas, will change the hydrology of the area. One commenter requested that the Corps revoke this NWP or exclude golf courses, ski slopes, campgrounds and associated structures from this NWP. A couple of commenters suggested prohibiting the use of this NWP for habitat conversion, and the construction of buildings, stables and parking lots. Another commenter supported excluding hotels, racetracks, stadiums, and arenas from authorization by this NWP. A few commenters stated the proposed NWP encourages development of recreational facilities in wetlands, which creates maintenance problems, and they requested the NWP not be modified.

The Corps believes that recreational facilities that result in minimal individual and cumulative adverse effects on the aquatic environment should be authorized by this NWP, regardless of the changes that might occur to pre-construction grades or natural landscape contours in areas not subject to section 404 jurisdiction. This is consistent with activities authorized by other NWPs, which do not restrict grading and landscape contouring in uplands. Because of the pre-construction notification requirement for this permit, the district engineer will have the opportunity to review proposed recreational facilities to determine if they will result in more than minimal individual and cumulative adverse effects.

Six commenters objected to the proposal to allow district engineers to waive the 300 linear foot limit in ephemeral and intermittent streams. The district engineer will only waive the 300-linear foot limit in ephemeral and intermittent streams if he or she determines that the individual and cumulative adverse effects on the aquatic environment are minimal. Any waivers must be issued in writing from the district engineer.

Two commenters requested that the NWP be clarified so that acreage limits are applied cumulatively for both the original construction and expansion. One commenter said that this NWP should not be used with NWPs 29 or 39, to authorize recreational facilities within residential, commercial, or institutional developments, and that the ½ acre should apply to such projects.

The NWPs authorize single and complete projects, as defined in the ''Definitions'' section of the NWPs. The ½-acre limit associated with this NWP applies to a single and complete project. In any case, if the district engineer determines that the impacts of a proposed project are more than minimal, individually or cumulatively, he or she will assert discretionary authority and require an individual permit. It is not necessary to prohibit the use of NWP 42 with NWPs 29 or 39. Even though NWPs 29 and 39 may be used to authorize recreational facilities as attendant features of residential, commercial, or institutional developments, any use of NWP 42 with NWPs 29 or 39 would be limited by general condition 24, Use of Multiple Nationwide Permits. Under that general condition, the ½ acre limit would apply to such projects.

Two commenters supported requiring pre-construction notification for all activities authorized by this NWP. In addition, they stated that the Corps should require documentation in the pre-construction notification that the facilities will result in unaltered surface and groundwater regimes and will not alter flow into open waters or streams. Another commenter supported retaining the 1/10 acre threshold for pre-construction notifications and eliminating it completely for projects conducted under USDA programs. The commenter believed requiring pre-construction notifications for all activities makes more work for both the public and the Corps.

The Corps believes that pre-construction notifications are necessary to ensure that proposed activities will result in no more than minimal individual and cumulative adverse impacts. If the district engineer determines that the construction or expansion of recreational facilities will result in adverse effects on aquatic resources, including water regimes and flow, he or she can impose special conditions or require an individual permit.

One commenter opposed the prohibition on use of this NWP in non-tidal wetlands adjacent to tidal wetlands, stating that it is arbitrary.

We believe that prohibiting the use of this NWP to authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters to construct or expand recreational facilities is necessary to ensure that the NWP authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. Non-tidal wetlands adjacent to tidal waters warrant greater protection because of their interactions with those tidal waters and the functions and services they provide to coastal ecosystems. Construction activities resulting in discharges of dredged or fill material into those waters are more appropriately addressed through the individual permit process or regional general permits.

One commenter stated that recreation facilities proposing impacts in streams accessible to anadromous salmonids should not be authorized by this NWP. Another commenter request that the Corps place regional conditions on this NWP such that it will not authorize the construction of trails or paths along the top bank of a stream unless there is no loss of riparian vegetation or the riparian vegetation can grow back. That commenter also suggested that this NWP should not be used with NWP 13, since activities authorized by these two NWPs may adversely affect the addition of woody material in stream channels.

Division engineers can impose regional conditions on this NWP to address cumulative impacts, including impacts to salmon habitat. We do not agree that NWP 13 should be prohibited from being used with this NWP for a single and complete project. Bank stabilization may be required to maintain the integrity and safety of a recreational facility and to protect aquatic resources.

One commenter stated that the pre-construction notification requirement is not enough to ensure minimal impacts and that the Corps position that adverse impacts will be offset by compensatory mitigation is unfounded. This commenter also opposed eliminating the requirement to submit avoidance and minimization statements and water quality management measures.

The pre-construction notification requirement allows the Corps to evaluate recreational facilities on a case-by-case basis and determine if the project, as proposed, will result in more than minimal impact. The Corps believes that compensatory mitigation is an appropriate means of ensuring that adverse effects on the aquatic environment are minimal. The requirement to demonstrate avoidance

and minimization is part of general condition 20, Mitigation.

One commenter said that this NWP should be conditioned to require the establishment and maintenance of buffers adjacent to all open waters, streams, and wetlands on the site, to prevent water quality degradation due to erosion and sedimentation, protect stream banks, provide wildlife habitat, and to enhance watershed functions and values.

The establishment and maintenance of riparian areas next to streams and other open waters is addressed through the requirements of general condition 20, Mitigation. Please see the preamble discussion for general condition 20, where we address comments concerning requirements and recommended widths for riparian areas.

This NWP is reissued as proposed.

NWP 43. *Stormwater Management Facilities.* We proposed to modify this NWP to require pre-construction notification for the construction or expansion of stormwater management facilities, but not for maintenance activities. We also proposed to modify the 300 linear foot limit for the loss of stream bed by applying that limit to ephemeral streams. We proposed to allow district engineers to waive the 300 linear foot limit if the stream bed is intermittent or ephemeral and the filling and/or excavation of that stream bed will result in minimal individual and cumulative adverse effects on the aquatic environment. In addition, we proposed to remove the requirement for prospective permittees to submit maintenance plans and the permit text requiring the submission of compensatory mitigation proposals with pre-construction notifications.

One commenter suggested we refer to the definition of ''stormwater management facilities'' rather than furnish examples of the types of stormwater management facilities in the description of the NWP.

The text of the proposed NWP describes the type and nature of activities that are authorized in various stormwater management facilities (e.g., construction, maintenance, excavation, installation), rather than defining what constitutes a stormwater management facility. Therefore, we do not agree that the language within the text of the NWP is redundant or superfluous.

Several commenters requested we add restrictions to this NWP to exclude its use in special aquatic sites and/or prohibit construction of in-stream retention or detention basins and construction of hardened channels (e.g., concrete or riprap).

We do not agree it is necessary to prohibit the construction of in-stream retention or detention basins and/or hardened channels since division engineers can impose regional conditions to this NWP to exclude certain types of activities in specific streams, watersheds, or other designated aquatic resources to ensure impacts to the aquatic environment are minimal, individually and cumulatively. In addition, since construction and expansion activities require pre-construction notification, the district engineer can either require case-specific special conditions or exercise discretionary authority to require an individual permit if the proposed activity, such as construction of in-stream basins and/or hardened channels, would result in more than minimal adverse impact on the aquatic environment. All new construction and expansion of existing facilities requires a pre-construction notification.

Several commenters objected to the application of a 300 linear foot threshold for intermittent and ephemeral streams, while other commenters indicated the activities authorized under this NWP should apply exclusively to ephemeral streams and prohibit work in intermittent and perennial streams. One commenter stated that no stormwater management facilities should be constructed in waters of the United States.

We agree that intermittent and ephemeral streams often provide important functions, services, and values, although there are situations where activities in these streams will result only in minimal adverse effects on the aquatic environment. In many cases, the only practicable alternatives involve constructing stormwater management facilities in waters of the United States. The pre-construction notification process allows district engineers to review proposed construction and expansion activities on a case-by-case basis to ensure that those activities result in minimal individual and cumulative adverse effects on the aquatic environment.

In order for the 300 linear foot threshold for intermittent and ephemeral streams to be waived, the district engineer must make a written determination that the proposed work will result in no more than minimal adverse effects on the aquatic environment. If the district engineer does not provide written confirmation of the waiver, then the 300 linear foot limit remains in place and the prospective permittee must obtain another type of authorization for the proposed activity. As an added level of protection, division engineers can impose regional conditions to further restrict or prohibit the use of NWP 43 in high value perennial, intermittent and ephemeral streams. Please note that this NWP prohibits discharges of dredged or fill material to construct new stormwater management facilities in perennial streams.

Some commenters asserted that activities authorized under this NWP would result in adverse environmental impacts on spawning habitat or cause more than minimal adverse impacts to the aquatic environment if the 300 linear foot limit is waived, and, as a result should be evaluated under the Corps individual permit process.

In general, we believe the activities authorized under NWP 43 would result in minimal adverse impacts to the aquatic environment, including spawning habitat. Requiring individual permits for all activities that would otherwise qualify for authorization under NWP 43 based solely on the fact that they involve the loss of greater than 300 linear feet of ephemeral or intermittent stream bed would place an unnecessary burden on the Corps and the permittee, with negligible added environmental benefits. District engineers will use their knowledge of the local aquatic environments and case-specific circumstances to determine when proposed activities would result in more than minimal adverse effects on the aquatic environment and consequently require an individual permit. In addition, general conditions 2 and 3 provide for the protection of aquatic life movement and spawning habitat, respectively, which collectively we believe will help to ensure overall minimal impacts.

One of the commenters requested we establish criteria for the district engineer's determination to waive the 300 linear foot limit. One other commenter expressed concerns that in the absence of such guidelines there would be inconsistencies within the Corps as to how or to what degree the waiver is applied.

We believe deference must be given to the district engineers' expertise and knowledge of the local aquatic environment, as well as their assessment of information submitted in pre-construction notifications, to make case-specific determinations on the effects to the aquatic environment. Based on the inherent variability across the nation, we disagree that it is necessary or appropriate to establish nationally applicable criteria for the application of the waiver. Aquatic resource functions, services, and values differ across the United States and,

accordingly, there will be corresponding differences in the criteria considered for implementation of the waiver consistent with regional and/or local variations. District engineers will make their case-specific determinations on the appropriateness of the waiver based on the characteristics of the local aquatic environment and in consideration of the specific circumstances of the proposed activity.

Some commenters suggested we combine this NWP with NWP 3, Maintenance, since both include maintenance activities.

We believe the specific requirements of NWP 43 are necessary to allow for specific types of maintenance activities that may not be authorized by NWP 3. For example, NWP 43 authorizes activities necessary to return the storm water management facility to its original design capacities, which may include basins that are not considered structures or fills. In contrast, NWP 3 is limited to the repair, rehabilitation, or replacement of structures or fills, or the removal of accumulated sediments in the vicinity of existing structures.

A few commenters requested we provide clarifications to NWP 43, including whether maintenance and mitigation plans for these facilities would be required. Several commenters requested we retain the requirement for submittal of maintenance plans for stormwater management facilities. Other commenters indicated the pre-construction notifications should include maintenance plans, avoidance and minimization measures, and water quality management measures.

The removal of the requirement for prospective permittees to submit maintenance plans and compensatory mitigation plans with pre-construction notifications simplifies this NWP and eliminates redundancy with general condition 20, Mitigation. Maintenance plans are not necessary if maintenance does not increase the design capacity of the facility. For new construction or expansion of existing facilities, compensatory mitigation requirements are addressed in general condition 20, Mitigation. Division engineers also have the ability to impose regional conditions to ensure specific activities authorized under this NWP result in minimal adverse impacts on the aquatic environment.

One commenter indicated maintenance of an existing stormwater management facility should not require Department of the Army authorization.

We disagree with this comment. Unless an exempted activity, all work and/or actions that result in the discharge of dredged or fill material into waters of the United States require Department of the Army authorization.

One commenter opposed the elimination of the 1/10 acre pre-construction notification threshold.

We believe that pre-construction notification should be required for all new construction and expansion of existing facilities in order for the Corps to ensure that the individual and cumulative adverse environmental impacts associated with the project are minimal.

One commenter indicated this NWP should not apply to specific watersheds, while another commenter insisted we not re-issue this NWP.

We believe the stormwater management facilities authorized under NWP 43 often constitute vital development or improvement projects that serve important public functions, including protection of aquatic resources. While such activities may need to be located in waters of the United States, we believe the underlying provisions of the NWP program that require all authorized activities to have minimal impacts on the aquatic environment, coupled with the ability of division engineers to impose regional conditions on specific activities, will provide effective regulatory mechanisms for protecting the aquatic environment without adding further restrictions on the use of NWP 43.

One commenter indicated the prohibition on use in non-tidal wetlands adjacent to tidal waters is an unfair limitation to prospective permittees in coastal plains.

In consideration of the relatively high functions, services, and values these wetlands contribute to the overall health of the aquatic environment on a national basis, we do not agree that the prohibition on the use of NWP 43 in non-tidal wetlands adjacent to tidal waters is unfair to those perspective permittees located in coastal plains. More importantly, this prohibition is necessary to ensure that this NWP authorize only activities with minimal adverse effects, individually and cumulatively.

We have slightly revised the wording of this NWP to clarify that activities which increase existing capacity may be authorized as ''expansion'' of existing facilities if pre-construction notification is submitted.

This NWP is reissued as modified above.

NWP 44. *Mining Activities.* We proposed to simplify this NWP and modify it to authorize all types of mining activities except for coal mining. Surface coal mining activities may be authorized by NWP 21. Other types of coal mining activities may be authorized by NWP 49 (Coal Remining Activities) or NWP 50 (Underground Coal Mining Activities). This NWP continues to authorize aggregate mining and hard rock/mineral mining activities. We proposed to retain the 1/2 acre limit for this NWP.

A number of commenters supported reissuance of NWP 44, but opposed the 1/2 acre limit, stating that it is arbitrary and duplicative of other existing regulatory requirements, or is too stringent for the permit to be useable. Several commenters expressed support for the 1/2-acre limit and recommended adding a linear foot limit for stream impacts. One commenter recommended a 1/4 acre limit for this NWP, to protect anadromous fish. One commenter recommended a 2,000 linear foot limit for impacts to streams.

We believe that the terms and conditions of this NWP, including the 1/2-acre limit, will ensure that activities authorized by this NWP result in no more than minimal adverse effects to the aquatic environment, individually and cumulatively. Aggregate and hard rock/mineral mining activities that do not qualify for authorization under this NWP can be authorized by individual permits. We believe the 1/2 acre limit is appropriate. We have modified the text of this NWP to clarify that the 1/2 acre limit applies to all non-tidal waters of the United States. This NWP only authorizes discharges of dredged or fill material into certain non-tidal waters of the United States. It does not authorize discharges into tidal waters, or non-tidal wetlands adjacent to tidal waters. As a pre-construction notification must be submitted for all activities, a specific linear foot threshold for streams is not necessary, as the district engineer can exercise discretionary authority or include special conditions to ensure that impacts to streams are no more than minimal. District or division engineers can condition this NWP on a case-by-case or regional basis to protect anadromous fish.

One commenter stated that ephemeral streams, isolated waters, and artificially created wetlands should not be considered in the acreage limitations.

The acreage limit for this NWP applies to waters of the United States. Impacts to non-jurisdictional waters are not considered as losses of waters of the United States, and are not counted towards the acreage limit for this NWP.

A couple of commenters stated that the reclamation plan should not be required as part of the pre-construction notification. Pre-construction notifications are frequently submitted to the Corps before reclamation plans are

required and the Corps has no authority over mining reclamation.

The Corps needs to review the reclamation plan to ensure that the authorized activities, including any required reclamation, do not result in more than minimal adverse environmental impact. In addition, reclamation activities may affect the need to require compensatory mitigation.

Several commenters opposed the removal of the prohibition on using NWP 44 in 100-year floodplains, while one commenter stated that certain mining activities will increase the flood storage capacity of floodplains and streams and thereby reduce flooding, which would benefit local communities.

In accordance with general condition 10, permittees must comply with applicable state or local floodplain management requirements that have been approved by the Federal Emergency Management Agency. In addition, the Corps will address impacts to 100-year floodplains through the case-by-case review that occurs through the pre-construction notification process.

Several commenters supported the simplification of NWP 44 by eliminating redundant terms and conditions. One commenter questioned whether the permittee could mine the same area over and over for aggregates as new deposits accumulate each year. This commenter also asked whether there is a limit on the number of times or locations that the permit can be used by one mining company, what kind of separation is necessary between mining sites, and whether this NWP can be used by one mining company on multiple streams.

This NWP can be used for any single and complete mining activity that has independent utility. The definitions of ''single and complete project'' and ''independent utility'' are provided in the ''Definitions'' section. Therefore, it is possible for an applicant to use this NWP each year or on multiple sites, provided each activity is a single and complete project that complies with the terms and conditions of the NWP, including the requirement that the individual and cumulative adverse environmental impacts are minimal. In response to pre-construction notifications, district engineers will determine whether proposed mining activities constitute separate single and complete projects that qualify for NWP authorization.

A number of commenters were opposed to the reissuance of NWP 44 because they believe the environmental impacts associated with the permit are more than minimal, and could result in significant adverse effects to rivers and streams, including those with important fish and mussel species. One commenter stated that this NWP does not satisfy the ''similar in nature'' requirement for general permits. One commenter recommended that the Corps establish an activity-specific NWP for the aggregates industry. One commenter recommended excluding peat mining and in-stream gravel mining, due to the environmental damage produced by these types of mining.

This NWP authorizes mining activities that have no more than minimal individual and cumulative adverse effects on the aquatic environment. The terms and conditions of this NWP, including the NWP general conditions, will ensure that these mining activities will have no more than minimal adverse environmental effects. All activities authorized by this NWP require pre-construction notification to the district engineer prior to commencement of mining activities. The pre-construction notification process allows district engineers to review mining activities on a case-by-case basis, to ensure that the proposed work has no more than minimal adverse effects on the aquatic environment. The district engineer can add special conditions to the NWP authorization to ensure that any adverse effects on the aquatic environment are no more than minimal, or exercise discretionary authority to require an individual permit for the work. This NWP complies with the ''similar in nature'' requirement of general permits because it authorizes a specific category of activities (i.e., mining activities, except for coal mining activities).

One commenter recommended that the NWP be revoked in Montana because these activities would have more than minimal adverse environmental effects. One commenter also stated that the permit is not adequately coordinated with state and federal resource agencies and eliminates the public interest review.

Division engineers may add regional conditions to this NWP to enhance protection of the aquatic environment and address local concerns. Division engineers can also revoke this NWP in a specific geographic area if the use of that NWP would result in more than minimal adverse effects on the aquatic environment, especially in high value or unique wetlands and other waters.

This NWP is reissued with the modification discussed above.

NWP 45. *Repair of Uplands Damaged by Discrete Events.* This was proposed as NWP A. We proposed to remove paragraph (iii) and portions of paragraph (i) from NWP 3 to this new NWP, to authorize emergency repair activities. This was intended to simplify NWP 3 and limit that NWP to routine maintenance activities.

Numerous commenters supported the issuance of this new NWP.

The majority of the comments received in response to the proposed NWP involved general concerns regarding the way in which this permit could affect time critical responses for emergency situations. Many commenters stated that authorization of the repair, rehabilitation, or replacement of structures or fills destroyed or damaged by storms or other discrete events should remain in NWP 3, since NWP 3 did not require pre-construction notification for those activities. Therefore, NWP 3 would allow expeditious maintenance activities, especially for infrastructure and other important features.

We agree, and have returned the language to NWP 3 that authorizes the repair, rehabilitation, or replacement of structures or fills destroyed or damaged by storms or other discrete events. We wish to clarify that this NWP is not intended to serve as an emergency permit. An ''emergency'' is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action is not undertaken within a time period that does not allow the Corps to process the application under standard procedures. As many commenters pointed out, pursuant to 33 CFR 325.2(e)(4), the Corps has already developed special permitting and permit application processing procedures for emergency situations, which are applicable to all types of DA permits. Further, as several commenters indicated, in accordance with 33 CFR 323.4(a)(2), certain emergency response activities are exempted from the permitting requirements of Section 404 of the Clean Water Act. As a result of the changes discussed above, this NWP authorizes only the restoration of upland areas damaged by storms, floods, or other discrete events. Those repairs may or may not require emergency processing, though in most cases we believe they will not. We believe that the confusion regarding the purpose of this NWP was caused by the inclusion of the word ''Emergency'' in its name. In order to remove that confusion, we are renaming this NWP ''Repair of Uplands Damaged by Discrete Events.''

Several commenters expressed concerns over the lack of clear limits for this NWP, and recommended